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VOL. 5—TEXAS COURT APPEAL REPORTS.

Q. 16

14

CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF THE

STATE OF TEXAS

DURING THE

LATTER PART OF THE TYLER TERM, 1878, AND THE EARLY
PART OF THE GALVESTON TERM, 1879.

REPORTED BY

JACKSON & JACKSON.

VOL. V.

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Rec. June 18, 1879

COURT OF APPEALS OF THE STATE OF TEXAS.

PRESIDING JUDGE:

HON. M. D. ECTOR.

JUDGES:

HON. C. M. WINKLER.

HON. JOHN P. WHITE.

ATTORNEY-GENERAL:

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¹ Promoted at General Election, Nov. 1878.

² By appointment to fill vacancy.

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PREFACE.

This volume contains the criminal decisions rendered during the latter part of the Tyler Term, 1878, and nearly all of those rendered at the Galveston Term, 1879. They are characterized by the variety, as well as the importance, of the questions involved in them. The great majority of the affirmances over the reversals attests that the administration of the criminal laws continues to improve.

It will be observed that several changes in the organization of the Attorney-General's department have occurred since the appearance of the fourth volume of these Reports. H. H. Boone, Esq., Attorney-General since the Constitution of 1876 took effect, having determined to resume the general practice of his profession, declined to accept a reëlection, which otherwise would have been tendered him without competition. His term expired on January 9, 1879, and on that date he was succeeded by George McCormick, Esq., elected at the general election of November, 1878. This occasioned a temporary vacancy in the Assistant Attorney-Generalship, and W. B. Dunham, Esq., was appointed to supply it. Immediately on the inauguration of Governor Roberts, Thomas Ball, Esq., was appointed Assistant Attorney-General for the regular term.

It may not be amiss, even thus early, to call the attention of the Bar of Texas to the fact that one of the inevitable results to ensue from the revision of the Penal Code and the Code of Criminal Procedure, and from the amendments thereto of the Sixteenth Legislature, will be to generate innumerable new and many important questions for the

construction of the courts, and for ultimate adjudication by the Court of Appeals. This must enhance, if possible, the indispensability of these Reports to all practitioners of criminal law in this State, and to all officials intrusted with its enforcement.

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COURT OF APPEALS OF TEXAS.

TYLER TERM, 1878.

JOHN TAYLOR *v.* THE STATE.

1. **THEFT — INDICTMENT.** — If the ownership of property stolen be alleged in parties to the grand jurors unknown, it is sufficiently laid.
2. **EVIDENCE.** — It is the province of the jury to reconcile all conflict of testimony, if possible, and if not, to give credit to such as in their opinion is best entitled to it.

APPEAL from the District Court of Coryell. Tried below before the Hon. J. R. FLEMING.

The indictment was for theft of an estray, alleging the owner to be unknown.

No brief for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. Appellant was indicted, tried, and convicted for the theft of “a certain mare, an estray,” and his punishment assessed at ten years’ imprisonment in the penitentiary. The indictment alleged that the owner of the animal was unknown, and sufficiently charges the offence. *Culbertson v. The State*, 2 Texas Ct. App. 324. See a similar indictment in *McGee v. The State*, 43 Texas, 662.

No objection is urged or any question raised here to the legality of the proceedings had upon the trial, except that the evidence is insufficient to support the verdict and judgment. If the witnesses for the State are to be believed,

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then the defendant is unquestionably guilty; if the witnesses for the defence are to be believed, then it is incontrovertibly certain that he is innocent.

It was the province of the jury, from the evidence, to determine and settle the question. The court properly instructed them as to their duty in the premises, and this court will not disturb the verdict and judgment. *Parrish v. The State*, 45 Texas, 51; *Addison v. The State*, 3 Texas Ct. App. 44; *Brown v. The State*, 1 Texas Ct. App. 154.

No error having been committed on the trial in the court below, the judgment is affirmed.

Affirmed.

JOHN HILL v. THE STATE.

1. **INTENT.** — Every person is presumed to understand the probable result of his acts, and when an unlawful act is clearly shown to have been committed, it is for the defendant to show facts which mitigate, justify, or excuse, so that a reasonable doubt, at least, may arise upon the entire evidence as to his guilt.
2. **CHARGE OF THE COURT.** — In a trial for murder, where the evidence creates the slightest doubt that the crime may be graded below murder in the first degree, and yet be a malicious killing, it is the duty of the court to give the jury an opportunity to pass upon that doubt. In this case it was not error to charge the jury on murder in the second degree.
3. **MANSLAUGHTER.** — In order to reduce a homicide from murder in the first or second degree to manslaughter, because of insulting words or conduct to a female relative, it must appear that the killing was really on that provocation, and that it took place immediately upon the uttering or happening of the insulting words or conduct, or so soon thereafter as the party killing met with the person killed, after having been informed of the insulting words or conduct.

APPEAL from the District Court of Montgomery. Tried below before the Hon. J. MASTERSON.

The opinion states the case.

No brief for the appellant.

Opinion of the court.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was indicted for the murder of John Wells. On a trial by jury he was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for forty years. A motion for a new trial was made, but overruled, and an appeal taken.

The main questions in this cause arise upon the charge of the court to the jury. The statement of facts shows that John Hill, the defendant, killed John Wells, in the county of Montgomery, on August 24, A. D. 1877. On the trial, defendant sought to reduce the homicide to manslaughter, because of insulting words and conduct by the deceased. The case made by the evidence is, in substance, as follows: At the time of the homicide, John Wells and John Hill were living at the house of Mrs. Mattie E. Denton. Wells was then between seventeen and eighteen years old, and Hill between eighteen and nineteen. Wells was cropping with her, managing her place, under her directions. He commenced living with her in November, 1876. Hill came to her house in April, 1877, and from that time had lived with his aunt, Mrs. Denton, until the homicide. He worked sometimes, but not regularly. Mrs. Denton was a widow lady, and had five children, the oldest, Lula, a daughter, who was ten years of age at the trial.

We make the following extracts from Mrs. Denton's evidence. She testified as follows, to wit: "On the evening of August 24, 1877, between two and three o'clock, John Hill and John Wells were sitting on the gallery of my house. John Hill said he was ready to go to work. I asked John Wells if he was ready to go to work. He answered, 'No;' that he was going to gather and shell corn to go to mill. John Hill then asked John Wells, 'What

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ridiculous stories have you been telling the woman Margaret, at Post's mill, about Aunt Mattie?' John Wells replied that 'he had not told any; if she said so she lied, and if any one else said so, they lied.' John Hill then said he would not stand it much longer, and went into the room and got his pistol, and walked out on the gallery and fired at John Wells, and then went around in front of him and shot at him twice more, or the pistol went off twice more, I do not know which. John Wells was sitting, leaning against a post on the gallery, with a knife in his hand; had been peeling and eating peaches while sitting there. * * * Wells's feet were on the gallery floor, upon which he was sitting. In a moment or two after he was shot he fell out on the ground, and was soon dead. After Hill shot Wells, he came into the house and asked me for his carpet-sack. I gave it to him. He then stepped to the door and asked me for his coat, and walked out of the house, and took my horse and left. I did not see him any more until I saw him at the jail in Anderson."

On cross-examination, she testified that "when the defendant spoke of Aunt Mattie, he meant me; that just after dinner of that day I went into my room and found John Hill there, leaning with his hand upon the mantelpiece. He asked me what these things were that John Wells had been saying about me. I told him what had occurred; that I was not surprised to hear that John Wells had been talking about me; that he had done worse. I then told him that John Wells had at one time tried to pull me down on the bed; that he had accused me of going to bed with Garrett Scott, and had accused me of improper intimacy with almost every gentleman who visited the house, and had said to me many other things that I cannot find suitable language to express. This conversation occurred just after dinner. John Hill went out on the gallery. John Wells was there. After cleaning up the table and closing the doors, I went to

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hunt my work-basket, and went out on the gallery, sat down, and took my work and commenced sewing. Hill was reading, or apparently reading, a book, and Wells was sitting, leaning against a post of the gallery, when the conversation commenced which immediately preceded the killing. When Wells tried to pull me on the bed, Sallie Floyd was in the cook-room ; and my child Lula, when I screamed, came into the room and hit Wells with the broom.”

* * *

On the reëxamination she stated : “ I have told several persons about the insulting words and conduct of Wells toward me ; don’t recollect to whom I stated them. I told about it before John Hill was arrested, but cannot now remember to whom ; I cannot tell to whom I told these facts, either before or after the arrest of John Hill.

* * * I made no statement before the coroner’s jury of inquest about the insulting language and conduct of John Wells towards me. I was not asked about it.”

Lula Denton, the second witness placed on the stand by the State, in her evidence differed in no material particular from her mother in regard to the killing, and the conversation on the piazza which immediately preceded the killing, and in which her mother, the defendant, and the deceased all took part. On cross-examination she said : “ When John Wells tried to pull ma down on the bed I was on the gallery. I heard ma scream. I went into the room and saw Wells pulling her. I struck him with a broom.” * * *

Margaret Duncan testified as follows : “ I live at Mr. Post’s mill. I knew John Wells, and saw him just before they say he was killed. I never told him, nor did he ever tell me, anything about Mrs. Denton. I knew John Hill, the defendant. I never told him anything that John Wells told me about Mrs. Denton. John Wells never told me anything about Mrs. Denton.”

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We find some evidence in the record in relation to a trial of the deceased about two months prior to the killing, before a magistrate, on the charge of unlawfully carrying a pistol, in which the defendant was a witness against Wells. We make the following extract from the testimony of the witness Smott :

“ Wells and Hill seemed to be friendly at the time of the trial about the pistol, and seemed to be so after that time. I did not know that there had been any feeling between them until some time after this, and about two weeks before the killing. When John Hill was riding with me on my wagon to mill, he told me that ‘ he had taken more off of John Wells than he ever had any other person, and that he would not stand it much longer.’ I was, after this, with Hill and Wells. I saw one or both of them every few days. I saw them together after the conversation spoken of in my direct examination. I did not at that time attach much importance to the remark.”

The first objection to the charge of the court is that it keeps prominently before the minds of the jury the question of the intent with which the homicide was committed. We cannot commend the charge for its brevity. There are one or two expressions in the charge, when the court is attempting to instruct the jury under what state of facts the defendant would be guilty of murder in the first degree, which had best been omitted. The court first defined murder in the language of the statute ; gave the distinctive difference between murder in the first degree, murder in the second degree, and manslaughter ; properly defined express and implied malice ; explained to the jury under what circumstances a homicide would be reduced to the grade of manslaughter, by reason of insulting words or conduct by the deceased toward a female relative of the slayer ; and gave the defendant the benefit of the presumption of inno-

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cence and of a reasonable doubt, not only as to the highest offence included in the indictment, but also as between the different degrees of the offence.

As the jury did not find the defendant guilty of murder in the first degree, the accused has no just cause of complaint, even if the charge of the court on murder in the first degree, when applied to the facts, was not a very clear and accurate enunciation of the law.

We have carefully examined the entire charge, and, take it as a whole, we do not believe it is liable to the first objection made to it by defendant. The doctrine of intent, as it prevails in the criminal law, says Mr. Bishop, an eminent philosophical writer on the criminal law, is necessarily one of the foundation principles of public justice. When one person kills another, the killing must be done with malice aforethought to make the crime of murder. It is a principle of the common law, as old as the law itself, that all homicide is presumed to be malicious until the contrary appeareth from the evidence. This is the law in Texas. In the case of *Farrer v. The State*, 42 Texas, 265, the Supreme Court say: "It is a familiar axiom of the law that every person is presumed to understand the probable result of his acts. And when an unlawful act is clearly shown to have been done, it is for the defendant to show facts which mitigate, excuse, or justify it, so that a reasonable doubt, at least, may arise on the entire evidence in the case as to his guilt. Hence, when the killing is proved, and it is not shown to have been done under sudden passion, induced by an adequate cause, or under circumstances which excuse or justify it, such killing must be regarded as voluntary and designed, and, therefore, with the malice which the law imputes to such homicide."

The charge in this case, in drawing the distinction between murder of the first degree, murder in the second degree, and manslaughter, gives sufficient prominence to

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the mental condition of the accused to enable the jury to correctly determine whether Hill killed Wells with malice aforethought, or under the immediate influence of sudden passion, arising from an adequate cause.

The second error assigned is, "that the court erred in submitting to the jury the question of murder in the second degree at all in the cause, because the facts proven show either murder in the first degree or manslaughter; and in this cause there was given to the jury, by charging murder in the second degree, a chance for a compromise verdict, when, if murder in the first degree and manslaughter were alone charged, as was the law of the case, the jury would not have found higher than manslaughter."

We cannot say that this assignment of error is well made, or that any injury resulted to the defendant because the court submitted to the jury a charge on murder in the second degree. In any case where the defendant is indicted for murder, and the facts in evidence create a doubt, however slight, that the case might be graded below murder in the first degree, and yet be a malicious killing, it would be the duty of the court to give the jury an opportunity to pass upon that doubt. *Halbert v. The State*, 3 Texas Ct. App. 661. Appellate tribunals are not inclined to disturb verdicts for the cause last assigned, unless it appears that injustice has been done to the accused.

It is insisted by defendant's counsel, and assigned as error, that the court in its charge to the jury presented, in a manner, too forcibly, the effect of the weapon used, in ascertaining the intent with which the homicide was committed. The most serious objection on this point, we think, arises on the following subdivision of the charge: "But if you have a fair and reasonable doubt whether the facts in evidence establish the guilt of defendant of murder in the first degree, then consider and find from the evidence if the defendant is guilty of murder in the second degree,

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as already defined. If there was no express malice, no deliberate and cool purpose formed in the mind of defendant, prior to the act of killing, to take the life of John Wells, followed by killing by the use of a deadly weapon; then if you find from the evidence that the act of John Hill, resulting in the death of John Wells, was committed by said Hill from a transport of passion of such a character as to have rendered him incapable of reflection, although the provocation producing such a state of mind was not sufficient in law to extenuate the killing and reduce it to manslaughter; yet if, before the killing, he intended to kill said Wells,—if the intention existed for a moment of time before the act,—then the law implies malice where the evidence shows that the means or weapon used was intended to, and was reasonably calculated to, effect the purpose intended; then, unless the facts in evidence reduce the offence to manslaughter, you will find the defendant guilty of murder in the first degree.”

After a careful examination of the above paragraph, and, in fact, all other portions of the charge where any reference is made to a “deadly weapon,” we believe the charge is so qualified as not to be liable to the objections urged against it. The jury were pointedly and properly instructed under what circumstances the law would reduce a homicide to the grade of manslaughter, because of insulting words and conduct of the person killed towards a female relative of the party committing the homicide.

We make the following extract from the charge on this point: “There are various causes which, by the law, are considered adequate causes, so as to constitute what would otherwise be murder in the first or second degree to manslaughter. In this case, the cause sought to be made by the defendant is ‘insulting words and conduct’ of the person killed towards a female relative of the party guilty of the homicide. Where it is sought to reduce the homicide

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to the grade of manslaughter, by reason of the alleged insults to a female relative, it must appear from the evidence that the killing took place immediately upon the happening of the insulting conduct or the uttering of the insulting words, or so soon thereafter as the party killing may meet with the person killed, after having been informed of such insults. The jury, in every case where such defence is sought to be put up, will consider the evidence, and from it determine whether, under all the circumstances, the insulting words or gestures were the real cause which provoked the killing. In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary, not only that adequate cause existed to produce the state of passion or emotion known as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, but it is also necessary to satisfy the jury that such state of mind did exist at the time of the commission of the offence."

And again, near the close of the charge, we find the following instruction: "If the proof satisfy you that Hill was a relative of Mrs. Denton, and the proof further shows that the deceased had used insulting words or conduct toward Mrs. Denton, and if it further appears from the evidence that the killing took place immediately upon the happening of the insulting conduct or the uttering of the insulting words, or so soon thereafter as Hill met Wells, after having been informed of such insults, then under the law of manslaughter the defendant is guilty of manslaughter, and you will in that case so find." This last instruction is a clear cut of the law as applicable to the facts in this case. Pasc. Dig., arts. 2254, 2255. The jury were at liberty to determine whether, under all the circumstances, the insulting words and conduct of the deceased towards the aunt of the accused was the real cause which provoked the killing; and if so, whether the accused

Syllabus.

acted with that promptness which the law requires to reduce the killing to the grade of manslaughter. If the defendant acted upon what his aunt, Mrs. Denton, told him of the insulting words and conduct of the deceased towards her, the jury may reasonably have concluded that he did not kill Wells as soon as he met with him after having been informed of such insults; but, on the contrary, waited for an hour or more in the presence of the deceased, until sufficient time had elapsed for cool reflection. Or it is equally reasonable to conclude that the jury believed the defence attempted to be made available by the accused was an afterthought, — a trumped-up story. No exception was taken to the charge of the court at the trial, and no additional instructions were asked by the defendant.

We have given the case that careful examination and consideration which its importance demands, and have discovered nothing that would warrant a reversal of the judgment. The judgment of the District Court is, therefore, affirmed.

Affirmed.

H. D. WATSON v. THE STATE.

1. JUDICIAL COGNIZANCE — VARIANCE. — This court judicially knows that there is a Criminal District Court for the counties of Galveston and Harris, and that the Hon. Gustave Cook is the judge thereof. When engaged in his judicial duties in Harris County, his proper official designation is judge of the Criminal District Court of Harris County. His official signature to an order, however, as "Judge, Criminal Dist. Court, Galveston and Harris Counties," did not impair the competency of the order as evidence in support of an allegation which described him as judge of the Criminal District Court of Harris County.
2. SUBORNATION OF PERJURY — EVIDENCE. — Accused was tried for attempting to induce a person to give certain false evidence at the impending hearing of a writ of *habeas corpus* awarded to one G. by the judge of the Criminal District Court of Harris County. The State offered in evidence an order of the judge who granted the writ, whereby the hearing of the

Argument for the appellant.

writ was transferred to the judge of the District Court of Harris County. To the admission of the order as evidence, the defence objected that it was irrelevant, and that the transfer ordered was without authority of law. But *held*, that the order was relevant to the allegation that the writ of *habeas corpus* was pending when the offence was alleged to have been committed, and that the transfer of the hearing of the *habeas corpus* was proper under the circumstances, and presented no objection available by the defendant in this case.

8. **SAME.** — In a trial for attempting to induce a witness to testify falsely, it seems that the materiality of the solicited false testimony is a question which should be submitted to the jury, under proper instructions.
4. **SAME—CHARGE OF THE COURT.** — Indictment charged that the accused offered \$150 to one M. if he would give certain false testimony on the hearing of a writ of *habeas corpus* pending in behalf of one G. The evidence was to the effect that the accused told M. that G. would pay him that sum if he would testify as alleged. *Held*, that this evidence does not support the allegation that the offer was made by the accused himself, and the jury should have been so instructed, as part of the law applicable to the case made by the pleading and the evidence.
5. **PLEADING.** — Descriptive averments in an indictment, though unnecessarily particular, must be proved as made.
6. **NEW TRIAL.** — That a new trial will not be granted in order to afford the accused an opportunity to impeach a State's witness is now too well settled to admit of question.
7. **PERJURY.** — INDICTMENTS for perjury should specify the facts essential to the offence, to wit, (1) the judicial proceeding or due course of justice in which the oath was taken; (2) the lawful taking of the oath; (3) the testimony given; (4) its materiality to the issue; and (5) its wilful falsehood.

APPEAL from the Criminal District Court of Harris.
Tried below before the Hon. G. Cook.

The substance of the indictment is fully set out in the opinion. The jury found the appellant guilty, and assessed his punishment at four years' confinement in the penitentiary. The opinion clearly discloses such matters of fact as underlie the rulings made.

Likens & Stewart, for the appellant. Upon examination of the statement of facts, it will be seen that the application for writ of *habeas corpus* by W. L. Grissom was made to

Argument for the appellant.

Hon. Gustave Cook, judge of the Criminal District Court of Galveston and Harris Counties, and after the granting of the writ, and pending the examination thereunder, "the further consideration of the case" was, *by his consent*, transferred to Judge Masterson.

It is most respectfully submitted that this act on the part of Judge Cook, and the proceeding under and by authority of said order by Judge Masterson, was without the sanction of law or a single precedent in practice, and the introduction of any order or proceeding of Judge Masterson thereunder, in evidence in the trial of this cause, was error.

The powers of judges of all courts created by our organic law are specifically defined by the statutes passed for that purpose, and where the law stops the limit of judicial power is reached. The writ of *habeas corpus* is a "writ of right," and the time when and the person or judge to whom the party who is deprived of his liberty may make his application are matters of personal privilege and individual choice; and for the argument, at least, we may say in this instance, where there were at least two judges present in the county who might lawfully issue the writ, that election was made, and being made, it was the *right* of the party to whom the writ was granted to have his examination thereunder made by the judge granting it, or at least his consent to the order made by Judge Cook; and even if that had been made known to Judge Cook, and embodied in his order of transfer, we very much question the legal right of Judge Masterson to take cognizance of the writ unless the application for it had been made directly to him. Neither the organic nor statute law places any restrictions or limits upon the applicant for this writ as to time when, place where, and to whom to be made, of that class of judicial officers authorized to issue the writ; hence we conclude that, this being true, and that there is no express provision to be found in the law authorizing such transfer, the order

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was a nullity and the proceedings thereunder were without the sanction of law, and should have been excluded when offered in testimony on the trial of this cause below.

Again, the third charge is certainly upon the weight of evidence, in this: it, in effect, sums up the evidence and assumes that certain facts have been proven, by detailing them in substantially the words and order in which the testimony was given by the witness, thereby effectually precluding the jury from considering any evidence tending to exculpate the accused. See *Long v. The State*, 1 Texas Ct. App. 466; *Gibbs v. The State*, 1 Texas Ct. App. 12; *Searcy v. The State*, 1 Texas Ct. App. 440; *Johnson v. The State*, 1 Texas Ct. App. 609.

The eighth assignment is, that the court erred in refusing to grant the defendant a new trial. The first ground of the motion for new trial is: "The verdict is unsupported by the testimony." Let us see if the record will show that this position was well taken. The defendant is indicted under article 297 of the Criminal Code, and article 1920 of Paschal's Digest, which reads: "If any person shall, by any means whatever, corruptly attempt to induce another to commit the offence of perjury, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years." The very terms of this statute leads us to inquire, What is perjury? It is defined to be "a false statement, either written or verbal, deliberately and wilfully made, relating to something past or present, under the sanction of an oath, under circumstances in which an oath is required by law, or is necessary for the prosecution or defence of any private right, or for the ends of public justice. The oath or affirmation must be administered in the manner required by law, and by some person duly authorized to administer the same, in the matter or cause in which such oath or affirmation is taken."

An indictment against one for attempting to corruptly

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induce another to commit perjury should, we think, specifically charge that the accused attempted to induce another to commit all the essential acts required to be done in the perpetration of the crime of perjury. Whether the indictment in this case does so is a matter for discussion hereinafter. But the indictment does charge certain specific acts against the defendant. It says that the defendant did "feloniously and corruptly offer said James Masters one hundred and fifty dollars if he, the said James Masters, would on said hearing, under said writ of *habeas corpus*, swear and give evidence that Dr. Brown (meaning said Joseph W. Brown) had a pistol in his hand at the time said William L. Grissom shot him." The manner and means by which the defendant is charged to have corruptly attempted to induce James Masters to commit perjury is here stated. We do not think the indictment is too particular in this regard. Indeed, we think more should have been stated in order to make it a good indictment. But when the prosecutor states the offence with greater particularity than he is bound to do, the proof must correspond with the averments. *Warrington v. The State*, 1 Texas Ct. App. 173; *Williams v. The State*, 1 Texas Ct. App. 95; 1 Bishop's Cr. Law, secs. 234, 496; *The State v. Newland*, 7 Iowa, 242; *Murphy v. The State*, 28 Miss. 637.

The indictment does charge that the defendant did attempt to induce Masters "to swear and give in evidence." The law requires that the indictment should state at least this much. Now, we unhesitatingly declare that this averment is wholly unsupported by testimony. Nowhere in the record does it appear that Watson ever did attempt to induce Masters "to swear and give in evidence" any statement, of any character whatsoever, under the sanctity of an oath. Strike the testimony of Masters from the record, and there is no testimony upon which it will be pretended

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that the defendant ought to be convicted. Masters says no one heard the conversation between him and Watson, and we must look to his testimony alone to ascertain what that conversation was. He says: "He called me out, then, and told me that the man in jail would give me one hundred and fifty dollars if I would say that Dr. Brown had a pistol in his hand, and tried to shoot him first, when he shot him." Upon cross-examination, he varied his statement a little, and testified that Watson told him "that the man in jail *said* he would give me one hundred and fifty dollars to say that Dr. Brown had a pistol in his hand when he shot him, and that was all he did say to me about money."

This witness Masters had testified before Judge Master-son, upon the application of Grissom for bail, and his testimony on said examination had been reduced to writing. The state introduced it upon this trial, and in that written statement of his evidence he says: "He didn't tell he would give me a cent. He said that the man in jail said I wouldn't lose anything by it. He said the man would give me one hundred and fifty dollars if I would *say* that I saw Dr. Brown with a pistol," etc.

Giving to all the statements made by Masters in his testimony, deposed at different times, their full import, does it show that Watson ever asked him, or in any way attempted to induce him, to make said statement under oath? Not once does Masters say that Watson ever said one syllable to him about testifying or making any statement about the killing of Dr. Brown, under the sanction of an oath, in any court, or before any one authorized to administer oaths. His testimony only shows that Watson asked him "to say" that Dr. Brown had a pistol, but when he was "to say" it, or where he was "to say" it, or how he was "to say" it, the testimony does not disclose. He may have intended for him "to say" it upon a judicial investigation of Gris-

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som's case, or he may have intended him "to say" it upon the street, in order to allay the great excitement that prevailed against Grissom at the time for the killing of Dr. Brown. We do not know what he intended, nor can we arrive at his intention in any other manner than that which may be discovered by the testimony. And when the testimony fails to disclose it, no presumptions can be indulged in behalf of the State to make out the case, and the State must make good the allegations made in the indictment by proof, which must correspond with the averments contained in the indictment.

If, in cases of perjury, it be essential to prove that the false statement was made under the sanction of an oath, legally administered, is it not an irresistible conclusion that, in the crime of corruptly attempting to induce another to commit perjury, it must be shown that one attempted to induce the other to make the false statement under the sanction of an oath, to be legally administered?

Again, the averment of the indictment is that the defendant did "feloniously and corruptly offer said James Masters one hundred and fifty dollars." The testimony of Masters (to which we objected as being irrelevant) is that Watson told him "that the man in jail would give me one hundred and fifty dollars," or "that the man in jail said he would give me one hundred and fifty dollars."

We respectfully submit that this testimony does not support or sustain the allegation of the indictment, that the defendant did "feloniously and corruptly offer said James Masters one hundred and fifty dollars." The word "offer," like many other words, has different meanings or significations, as it may be differently employed; and to correctly define such a word, we must not fail to observe the use to which it has been appropriated.

"Except where a word, term, or phrase, is specially defined, all words used in this Code are to be taken and con-

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strued in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed." Code Cr. Proc., art. 28 (Pasc. Dig., art. 1630).

The rule laid down in our Criminal Code for the construction of statutes will do as well for the construction of language employed in indictments. Taking the word "offer," as here employed, and, considering the context and subject-matter relative to which it is employed in common language, can it mean anything else than a presentation, or a readiness averred to present the witness, at the very time, one hundred and fifty dollars?

In Webster's Unabridged Dictionary we find the word "offer" defined as follows: "Literally, to bring to or before; hence, to present for acceptance or rejection; to exhibit something that may be taken or received, or not. He offered me a sum of money; he offered me his umbrella, to defend me from the rain."

In this case the offer charged to have been made was of a sum of money, and such sum of money was not presented "for acceptance or rejection." The negro witness, Masters, has, we think, a correct knowledge of what is meant by offering a sum of money, and he exhibited his knowledge on this subject when, in his testimony, he said: "He did not tell me he would give me a cent."

That the motion for a new trial should have been overruled in this case of remarkable rulings is, perhaps, the most singular feature presented by the whole record; and when considered in connection with the facts, and in the light of well-settled principles and practice; when it is analyzed and understood in, as it seems to us, the only mode and manner that human reason can fairly employ, it strikes us as wellnigh impossible for this court to deny the appellant the reversal he asks here, upon the amended and supplemental motion above. The record will disclose that

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four days after the conviction of the appellant, the witness Jim Masters, a negro, upon whose testimony the conviction was had, prepared and mailed to Watson a letter, proposing, for the consideration of \$250, to absent himself and not testify in the case. It is true the letter refers to him in the third person, but the affidavit of Stauffer establishes the fact beyond question that it was handed to Stauffer by Masters himself, with the request that he would direct it, which Stauffer did, and deliver it to Masters. When we consider the contents of the letter itself, and the proof of Masters in connection with it, the conclusion is irresistible that he prepared it himself, or procured it to be done. But to remove all possible doubt, if, indeed, any could exist, as to the paternity of the document, we have the affidavit of Mr. Henry C. Thompson, a most reputable gentleman, that on October 26th, three days after the date of the letter, Masters approached him, as the supposed friend of Watson, and again makes the proposition to absent himself for a consideration, and this time for a less price, say \$150. We have also the affidavit of W. B. Paris, the jailer, clearly and unmistakably identifying the letter of Masters, attached to the motion, as also the affidavit of Stauffer, who directed it at the request of Masters, all of which fixes its identity beyond doubt.

Now, what is presented by this record as against the amended and supplemental motion for a new trial? Nothing but the unsupported affidavit of the witness, who proves himself unworthy of belief by having expressed, not only his willingness, but anxiety, to bargain for the privilege of failing to swear the truth. Will it be, can it be, doubted for one moment that a man who will, for money, close his mouth to the truth, will just as readily, for purposes of black-mail, revenge, or other villainous motive, open it wide to perjury? Can a reasonable doubt be indulged that the testimony of such a witness is not entitled to a

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moment's credence ; that a jury of intelligent men would refuse to convict upon the evidence of such a self-declared scoundrel? Surely not. Then, if the circumstances disclosed by the motion for new trial and appendant affidavits did, or would, if known at the trial, impeach and discredit the testimony of Masters ; and such facts and circumstances were not, and could not have been known at the trial, because they had not transpired, was it not the duty of the honorable judge to have granted the prayer of the motion ; and would not the promptings of simple justice have been better heeded by permitting other " twelve good and lawful men " to weigh well the testimony of such a witness before depriving their fellow-citizen of his liberty, and consigning to lasting infamy his name?

It was impossible for appellant, as the court will see and necessarily observe from an examination of the amended and supplemental motion for a new trial, to have procured the testimony therein relied upon before or on the trial, for the circumstances had not then transpired, and, of course, no amount of diligence could have procured the knowledge. It is admitted that in the civil practice it is but rarely permitted to grant a new trial on the ground of newly discovered evidence, where the object of such evidence is to impeach the credit of a witness, but it is respectfully submitted that no such rigidity obtains where the life or liberty of a citizen is involved. And if it did, the rule would be without reason, and therefore would not be law, that a party should be held to the procurement of a knowledge of facts, for any purpose whatever, to discredit a witness or otherwise, which had not been called into existence at a time when, if known, they could have been used as a defence. So, then, we have the testimony of Stauffer, Paris, Thompson, and Masters unimpeached, against the affidavit of Masters, who is self-convicted of a willingness to refuse to swear the truth for a price in money.

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To the eighth ground in the motion to arrest we will venture again to call the attention of your honors particularly, as in which, it seems to us (and in all candor we express the opinion), if none other existed, is found ample reason to entitle the appellant to a reversal of the judgment herein. The indictment does not show by any averment that James Masters was a witness of the killing of Joseph W. Brown, under the writ of *habeas corpus*, nor does it show or aver that he was ever *sworn* as a witness in the examination of W. L. Grissom, under the writ, both of which averments it was absolutely necessary should have been made and sustained by proof to have made out the offence with which the appellant was attempted to be charged by the indictment.

George McCormick, Assistant Attorney-General, and *F. M. Spencer*, for the State.

WINKLER, J. The indictment upon which the appellant was tried charges “that, on the twenty-seventh day of the month of May, in the year of our Lord one thousand eight hundred and seventy-seven, in the county of Harris, and State of Texas, one William L. Grissom had been duly and legally charged with the murder of Joseph W. Brown, and had been, by Coroner William A. Daly, committed to the jail of Harris County, without bail, to answer said charge of murder; that, on the twenty-sixth day of the said month of May, in the year aforesaid, the said William L. Grissom sued out a writ of *habeas corpus* before the Honorable Gustave Cook, the duly and legally appointed and qualified judge of the Criminal District Court of Harris County, with full power and authority to issue said writ of *habeas corpus*; and the grand jurors aforesaid, upon their oaths aforesaid, do further present that thereafter, to wit, on the twenty-seventh day of the month of May, in the year aforesaid, one H. D. Watson, late of the county aforesaid, in the said

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county of Harris, and State of Texas, before the hearing under *habeas corpus* was had, but while the same was pending, wickedly contriving and intending to prevent the due course of law and justice, and unjustly to procure the discharge and bail of said William L. Grissom, then, on the said twenty-seventh day of the month of May, in the year aforesaid, in the county aforesaid, unlawfully, feloniously, and corruptly did attempt to induce James Masters to commit the offence of perjury; and that the said H. D. Watson, on the day and year last mentioned, in said county of Harris, did feloniously and corruptly attempt to induce said James Masters to commit wilful and deliberate perjury on the hearing of the said *habeas corpus*, and did then and there, on said last-mentioned day and year, feloniously and corruptly offer said James Masters one hundred and fifty dollars if he, the said James Masters, would, on said hearing under said writ of *habeas corpus*, swear and give in evidence that Doctor Brown (meaning said Joseph W. Brown) had a pistol in his hand at the time said William L. Grissom shot him, it then and there being a material question on said hearing whether said Joseph W. Brown was the aggressor; whereas in truth and in fact said Joseph W. Brown did not have a pistol in his hand at the time said William L. Grissom shot him; and that he, the said H. D. Watson, then and there well knew that said evidence he was corruptly attempting said James Masters to swear and give in evidence on the hearing of said writ of *habeas corpus* was false; contrary to the law, and against the peace and dignity of the State.”

The indictment is based upon *article 297* of the Penal Code (Pasc. Dig., art. 1920), which is as follows: “If any person shall, by any means whatever, corruptly attempt to induce another to commit the offence of perjury, he shall be punished by imprisonment in the penitentiary, not less than two nor more than five years.”

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It is neither expedient nor essential to a proper determination of the merits of this appeal that we should attempt, *serialim*, a discussion of the several novel and interesting questions presented in the several bills of exception set out in the record, and the several grounds set out in the motions for a new trial and in arrest of judgment. The want of time forbids that we should do more than state conclusions as to the vital questions arising upon the record, and upon which a decision depends. This it is proposed to do in the order and to the extent necessary, as we find them set out in the appellant's assignment of errors, which he alleges were committed on the trial below, and which he contends are of sufficient importance to require a reversal of the judgment of conviction rendered against him.

The first error assigned is, that the court erred in admitting in evidence the petition of W. L. Grissom and the order of Judge Cook thereon, and the papers attached thereto, and to the admission of which the defendant objected on the ground, "because it went to sustain no allegation made in the indictment, and because the order grants the writ by a different judge than the one named in the indictment." It will be seen by reference to the indictment that the man Grissom had been charged with the murder of Joseph W. Brown; that he had been committed on the charge, and that Judge Cook, the duly appointed judge of the Criminal District Court of Harris County, had granted a writ of *habeas corpus*; and the bill of exceptions shows that the writ had been granted, requiring the production of the petitioner at a time and place named, that an inquiry might be made into the authority by which he was held.

In the indictment the officer is described as the "Honorable Gustave Cook, the duly and legally appointed and qualified judge of the Criminal District Court of Harris County." In the instrument offered in evidence, the *fiat*, he signs himself "Gustave Cook, Judge, Criminal Dist.

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Court, Galveston and Harris Counties.” We are of opinion that the evidence was admissible, as tending to support the allegation in the indictment that the *habeas corpus* proceeding had been instituted before competent authority, and that there was no material variance between the style of the officer set out in the indictment and that set out in the evidence.

It is judicially known to this court that there is a criminal court for the counties of Galveston and Harris, and that Hon. Gustave Cook is the judge of that court, and is required by law to hold terms of his court at stated times in each of those counties. When discharging the duties of his office in Galveston County, he would be properly styled judge of the Criminal District Court of Galveston County, and when performing those duties in Harris County, he would properly be styled judge of the Criminal District Court of Harris County. The court over which he presides is denominated the *Criminal* District Court, in contradistinction to the older and well understood District Courts, which we also know sit in Harris and in Galveston Counties, and all over the State; and when he is mentioned in that sense it would only be necessary to style him as judge of the *Criminal* District Court, and it would depend entirely, as to which county should be added, to consider which county the duty was required in. He is properly described as *judge of the Criminal District Court*.

The second assignment is, that the court erred in permitting to be read to the jury the order of Judge Gustave Cook transferring the application of W. L. Grissom for bail to the Hon. James Masterson, judge of the Twenty-first Judicial District, for hearing and determination, as is shown by defendant’s bill of exceptions number two, and for the reasons therein stated.

The order objected to is set out in the bill of exceptions, and, after stating the style of cause, is as follows:

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“Charged with the murder of J. W. Brown, in Harris County, on the 25th day of May, A. D. 1877: Committed by W. A. Daly, Esq., justice of the peace, and now produced before Gustave Cook, judge of the Criminal District Court of Galveston and Harris Counties, by Cornelius M. Noble, sheriff of Harris County, upon the order of said judge, on application of petitioner.

“It appearing that the State is not ready to proceed, and the duties of the undersigned requiring his presence officially in Galveston, it is ordered, by the consent of the Hon. James Masterson, district judge, that the further consideration of the case be transferred to him; and the sheriff is ordered to have the prisoner, with the witnesses, before him *instanter*, at the court-house of Harris County. This May 26th, 1877.

“[Signed]

GUSTAVE COOK,

“Judge Criminal Dist. Court.”

The objection taken to the introduction of this order in evidence is “because the law did not authorize such a transfer of the *habeas corpus* proceedings, and because the evidence was irrelevant, and did not prove any allegation contained in the indictment.”

The questions arising on this assignment are: First, Was the evidence admissible under the pleadings? and, second, Had Judge Cook authority to transfer the *habeas corpus* proceedings to the judge of the District Court for hearing and determination? As to this latter proposition, we may remark that we are unable to see plainly how the question of the right and power to transfer arose in the manner here presented; yet, inasmuch as it is a part of the record-history of the case, and necessary to dispose of it at some stage of the consideration of the case, it may be as well to meet it here as elsewhere. These questions are not free from difficulty in their determination, especially the latter. We have been afforded but little aid from elementary works

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or reports of adjudicated cases, and on some of the matters involved the court has not been able to fully concur; still, in the opinion of a majority of the court, the first question must be answered in the affirmative, on the ground that it is averred in the indictment that the proceeding in which the attempt to corrupt the witness is alleged was *still pending* at the time of the alleged commission of the offence by this appellant, — that it is only material that it was so pending before a judge having jurisdiction of the proceeding in which the attempted subornation was made. In other words, that in this connection it was only material that the indictment should show a legal proceeding pending at the time. As to the second question, we have seen no rule of law which was violated by the transfer, and, in the opinion of a majority of the court, there was no error committed in the transfer, under the circumstances set out in the order of transfer, of which the appellant can be heard to complain.

What has been said under this assignment must be held to apply to and be decisive of the question of authority to transfer, wherever it arises upon the record.

The third assignment of error, as well as the fifth, sixth, and seventh, call in question the correctness of the charge of the court, and embrace the eighth, ninth, tenth, and eleventh grounds set out in the motion for a new trial, and the corresponding bills of exception. We deem it proper to ask the consideration of the court, on another trial, whether the materiality of the testimony attempted to be procured by corrupting the witness Masters should not have been left to the jury, under an appropriate instruction. This is the only comment we have to make upon the main charge at present.

The following additional instruction was asked by the accused, to wit:

“ That the State must prove by satisfactory evidence the

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offence charged and specifically set forth in the indictment, and to do this the State, by testimony, must satisfy the minds of the jurors that the defendant, in the county of Harris, on or about the time charged in the indictment, did feloniously and corruptly offer said James Masters one hundred and fifty dollars if he, the said James Masters, would on said hearing, under said writ of *habeas corpus*, swear and give in evidence that Dr. Brown had a pistol in his hand at the time said William L. Grissom shot him; that the jury must be satisfied from the testimony that the defendant did make the offer of one hundred and fifty dollars himself, and not that he said some one else would pay it."

This instruction was refused, and the accused took a bill of exceptions. The legal propositions assumed in the refused instruction are (1) that the State was required to prove the offence charged as it is described in the indictment; (2) that it would not support the allegations in the indictment by proving that some person other than the accused offered to pay the money proposed to be used in corrupting the witness.

The rule, as stated by Mr. Greenleaf, and often quoted, is: "When a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of description must be proved, for they are all made essential to the identity." 1 Greenl. on Ev., sec. 65. This rule has been substantially followed, so far as we are advised, uniformly, both by the Supreme Court and this court. *Hill v. The State*, 41 Texas, 253; *Rose v. The State*, 1 Texas Ct. App. 400; *Courtney v. The State*, 3 Texas Ct. App. 257; *Sweat v. The State*, 4 Texas Ct. App. 617; *McGee v. The State*, 4 Texas Ct. App. 625; 1 Bishop's Cr. Proc., sec. 486, which see for the rule and examples of variance between the allegations and proof, where it is said: "The illustrations of this general

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doctrine to be found in the books are almost endless.” The questions we have heretofore been considering, when compared with the ones here presented, are of comparatively little moment. It is of vital importance to one on trial for a felony that the law applicable to his case should be given in charge to the jury, it being their bounden duty “to receive the law from the court, and be governed thereby.” Penal Code, art. 523 (Pasc. Dig., art. 3058).

It will be seen from an inspection of the record that the general charge given by the court embraces and covers all the grounds set out in the charge which was refused; not in the same language, it is true, nor in the same consecutive order; nor was this required. Yet they amounted substantially to the same as the refused charge, *except* the concluding paragraph of the latter, as follows: “That the jury must believe from the testimony that the defendant did make the offer of the one hundred and fifty dollars himself, and not that he said some one else would pay it.”

In the charge given this is the language used: “With the intent corruptly to induce James Masters to make such statement in evidence, under oath, upon the hearing, * * * say to James Masters that Grissom would give him (James Masters) one hundred and fifty dollars to make the statement under oath,” etc.

The charge in the indictment is, not that the defendant said that Grissom would give the money, but that H. D. Watson offered the money. The effect of the charge given is, that proof that Grissom said he would give \$150 if the witness would swear as desired would support the allegation in the indictment that the defendant offered the money. This, we are of opinion, upon the authority above cited, was error, and that such proof as that in the charge indicated would not support the descriptive averment in the indictment, which sets out the means employed by the accused to procure the corrupt and false testimony.

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We are of opinion that the pleader, in stating the means used in the effort to corrupt the witness with the particularity used in setting it out, made it incumbent on the State to prove it, at least substantially, as laid in the indictment. Whether it was necessary to charge the offence with such particularity, or not, is not now the question. What we hold is that the pleader, having stated the means employed in order to effect the criminal purpose, he must prove it as alleged. If we look to the evidence, it will be apparent that this instruction was manifestly prejudicial to the rights of the defendant. The charge of the court should have submitted to the jury the law of the case as made by the pleadings and the evidence. This he failed to do, which was error, and for this error the judgment must be reversed.

We are of opinion that there was no error in the rulings of the court upon the evidence as set out in the first assignment of error, and mentioned in bill of exception number four.

So far as the action of the court in refusing a new trial in order to permit the accused to impeach the prosecuting witness is concerned, and set forth in the eighth assignment of errors, we are of opinion there was no error. That a new trial will not be granted upon this ground is now too well settled to require a reference to authorities. For the foundation upon which the rule rests, see Whart. Cr. Law, sec. 3161; 1 Arch. Cr. Pr. & Pl. 118, sec. 126; *Terry v. The State*, 3 Texas Ct. App. 236, and cases there referred to. To unsettle this rule, and permit a party to obtain a new trial, after conviction, in order to procure testimony to impeach the witness on whose testimony a conviction was had, would be to open wide the doors leading to the commission of the too frequent crime of perjury; none other than an extraordinary case would warrant it.

One other subject requires to be noticed, to wit, the sufficiency of the indictment, which is questioned in the ninth

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assignment of errors and in the motion in arrest of judgment. We have considered the several grounds set out in the motion in arrest of judgment, and believe they are not tenable.

An indictment for perjury, says Mr. Greenleaf, should specify the facts essential to this offence, namely: First, the *judicial proceedings* or *due course of justice* in which the oath is taken; second, the oath lawfully taken; third, the testimony given; fourth, its materiality to the issue or point in hand; and, fifth, its wilful falsehood. 3 Greenl. on Ev., sec. 189. Varying the circumstances to suit this case, and testing the indictment thereby, it must be held to meet the requirements. It contains all required by article 395 of the Code of Criminal Procedure (Pasc. Dig., art. 3863). The offence is set out with such certainty that a conviction or acquittal under it could be successfully pleaded in bar of another prosecution for the same offence, which is all the certainty required. Code Cr. Proc., art. 328 (Pasc. Dig., art. 2865). "The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offence," is the language of the Code.

We are of opinion that there was error in the charge of the court, and on account thereof a new trial should have been awarded. For this error the judgment is reversed and the cause remanded.

Reversed and remanded.

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1. **JUROR'S OATH.** — If the judgment recites that the jury “were duly sworn,” this court will presume that the oath prescribed by the statute was the one administered.
2. **INFORMATION.** — An information must, in every material allegation, follow and correspond with the affidavit. Neither bad spelling nor verbal or grammatical inaccuracies, which do not affect the sense, are fatal to an indictment or information.
3. **PRACTICE.** — The appellant contends that the court below erred in sustaining the validity of an affidavit which was filed on Sunday, citing Paschal's Digest, art. 1424. *Held*, that this article applies only to civil suits; and *held*, that, having failed to raise that question in the court below, it amounted to a waiver, and it is too late to raise it for the first time in this court.
4. **AFFIDAVIT.** — An affidavit attached to an information that bears the file-mark of the court will itself be considered filed.

APPEAL from the County Court of Hunt. Tried below before the Hon. H. B. SIMONDS, County Judge.

E. W. Terhune, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The first assignment of error is, that “the court erred in rendering judgment on the information, because it was not based upon an affidavit filed in this cause.”

Every information must be based on an affidavit filed in the case, and setting up the offence charged in the information. The objection that the affidavit was not filed with the information is not sustained by the record. The information states that it is “founded on the written affidavit of Isaac Laster, which is herewith filed.” And the appellant states, in his motion for a new trial, that the affidavit was attached to the information, by a brass pin. On the back of the information is the following indorse-

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ment: "Filed the 5th day of May, A. D. 1878, A. Cameron, clerk."

The affidavit and information being attached together, we believe that the file-mark relates to both instruments, and shows that the information was based upon an affidavit filed in the cause.

The next position taken by the defendant is, that "the judgment is a nullity because the record only shows that the jury were duly sworn, and not that they were lawfully sworn, nor does it set out that the legal oath of a jury was administered." If the judgment recites that the jury "were duly sworn," it will be sufficient; and this court will, upon such recital in the judgment entry, presume that the oath prescribed by the statute had been administered to the jury. *Chambers v. The State*, 2 Texas Ct. App. 396; *Leer v. The State*, 2 Texas Ct. App. 495.

The next assignment of error is that "the court erred in rendering judgment on the information, because it does not follow the purported affidavit, nor correspond with it." This assignment is not well taken. The information, in every material allegation, must follow and correspond with the affidavit. The affidavit charges the defendant with the theft of seventy "ears of corn," and the information with seventy "years of corn." Bad spelling, verbal or grammatical inaccuracies, which do not affect the sense, are not fatal to an indictment. The writing of "*fifty-too*," for "*fifty-two*," was held not fatal, and so writing "*assalt*" for "*assault*." *The State v. Hedge*, 6 Ind. 333; *The State v. Crane*, 4 Wis. 400.

The remaining assignment of error is that "the court erred in rendering judgment, because the information was filed on Sunday." If we are to be governed by the file-marks indorsed on the information, this shows that the information was filed on May 5, 1878. There is no statement of facts in the record. This court, it may be said,

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judicially knows that the fifth day of May last was Sunday. The question attempted to be presented by this assignment is, Could the lower court render a valid judgment on an information filed on Sunday? In support of this assignment, counsel for defendant, in his brief, has cited but one authority on this question, to wit, Paschal's Digest, art. 1424. This article is as follows: "No civil suit shall be instituted, nor shall any process be had in any suit, on Sundays, except in cases of attachment or sequestration." This article applies only to civil suits.

A warrant of arrest may issue at any time, when oath is made before the proper officer that another has committed some offence against the laws of the State, and the requirements of the warrant are given. Arts. 2684, 2686. The Code also provides that "an arrest may be made on any day, or at any time of the day or night."

The only other provision to be found in our Code of Procedure relative to the action of courts on Sunday is to be found in Paschal's Digest, art. 3150. None of them have any special bearing on the question now before us. Our statute further provides that "whenever it is found that this Code fails to provide a rule of procedure in any particular state of case which may arise, and is, therefore, defective, the rules of the common law shall be applied and govern." Pasc. Dig., art. 2493. By the common law it appears that all judicial proceedings on Sunday are prohibited, and all other acts are lawful unless prohibited by statute. *Story v. Elliott*, 8 Cow. 27; *Baxter v. The People*, 3 Ill. 384; 3 Thomas's Coke, 354; *Shearman v. The State*, 1 Texas Ct. App. 215.

We believe that the question we are now considering is made too late, being raised for the first time in this court; that, not being raised in the lower court, it may be considered as having been waived by the defendant; or it may be that the clerk, in indorsing the time of filing on the

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information, may have given a wrong date, and if so, had the attention of that court been called to it at the proper time, such clerical error could have been corrected. And again, such clerical error may have been made by the clerk in preparing the transcript for this court; and in support of this view we see that the defendant, in his motion in arrest of judgment, states that the information was filed on May 6, 1878. The record further discloses the fact that the case was tried on the seventh day of May.

We find no error committed by the court below in the trial of this cause. The judgment is, therefore, affirmed.

Affirmed.

WILLIS CANNON v. THE STATE.

PRACTICE. — The Code requires that the defendant's plea of "not guilty" shall be entered of record, and that if he fails to plead, the plea of "not guilty" shall be entered for him. If the transcript fails to show the entry, the conviction will be set aside. The record must show, also, that the jury was sworn; otherwise, the judgment will be set aside.

APPEAL from the County Court of Morris. Tried below before the Hon. J. F. MOSELY, County Judge.

Louis P. Wilson, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The record before us fails to show that the defendant in the lower court pleaded to the indictment, or that, on his failure to do so, the plea of not guilty was entered for him. Without a plea there was no issue for the jury to determine. The fact that the defendant pleaded, or that a plea of not guilty was entered for him, must affirmatively appear on the record, or a judgment of conviction

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will not stand. Pasc. Dig., arts. 2941, 2947, 2981; *Stacey v. The State*, 3 Texas Ct. App. 121; *Dempsey v. The State*, 3 Texas Ct. App. 429; *The State v. Matthews*, 20 Mo. 55. The transcript also fails to show that the jury were sworn in the case. Unless the record affirmatively shows that the jury were sworn, the judgment will be set aside.

The judgment of the lower court is reversed, and cause remanded.

Reversed and remanded.

JAMES PAYNE v. THE STATE.

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1. ASSAULT WITH INTENT TO MURDER.—It is not essential that the indictment allege the weapon used in an assault with intent to murder.
2. DRUNKENNESS.—Voluntary intoxication is no defence for crime.

APPEAL from the District Court of Hopkins. Tried below before the Hon. G. J. CLARK.

Hunter & Putnam and King & Blythe, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. The charge, as set out in the indictment, is that the defendant “did then and there an assault make in and upon the body of one William Oxford, with his express malice aforethought, and with the felonious, fraudulent intent him, the said William Oxford, then and there to murder,” etc.

A similar indictment, one almost identical in the language in which it was couched, was passed upon by this court in

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Montgomery v. The State, 4 Texas Ct. App. 140, and was held good. See also *Nash v. The State*, 2 Texas Ct. App. 362; *Hines v. The State*, 3 Texas Ct. App. 483.

No error was committed by the court in overruling defendant's motion to quash the indictment.

The only other question raised in the motion for a new trial and in the assignment of errors is, that the verdict and judgment are not supported by the evidence. It is contended that the evidence shows that defendant, at the time of the alleged commission of the offence, was intoxicated to such a degree as to be irresponsible for his actions. "Voluntary intoxication constitutes no defence for crime. To preserve his rationality is a duty which every one owes to others, and to society; and no injustice is done by holding one amenable for his acts done in a condition of voluntary intoxication." *Colbath v. The State*, 4 Texas Ct. App. 76.

In submitting the consideration of his condition to the jury, to be judged by them in coming at their verdict, the court certainly went as far as the defendant could reasonably ask, in the following extract, which we copy from the charge, viz.: "The jury are the sole judges of the facts and circumstances in proof before them. If the jury believe from the evidence that the defendant was capable of forming the intent to take life, and assaulted the party without provocation, with the specific intent to and for the purpose of killing him, then he would be guilty; otherwise, he would not be. If there was no intent to take life, and the assault was made with a deadly weapon, then the defendant would be guilty of an aggravated assault." This submitted the question most fairly for the defendant. No additional instructions were asked.

The evidence shows that defendant was intoxicated, but it does not show that he was bereft entirely of his reason;

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and it most certainly shows him to have been possessed of a wicked, reckless spirit, regardless of all social duty, and fatally bent upon mischief.

Believing that there was a sufficiency of evidence to support the verdict and judgment, and seeing no error in the record requiring a reversal, the judgment of the court below is affirmed.

Affirmed.

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REDDIN COLLINS v. THE STATE.

1. PLEADING—AVERMENT OF TIME.—It is essential that the information allege the commission of the offence at a time anterior to the filing of the information, and that the offence does not appear to be barred by limitation.
2. INFORMATION—VARIANCE.—An information is void unless based upon a proper affidavit. In this case the affidavit charges the offence as committed in the year of our Lord 187, and the information charges it as committed in 1877. *Held*, that the variance is fatal, and goes to the foundation of the prosecution.

APPEAL from the County Court of Hopkins. Tried below before the Hon. F. M. ROGERS, County Judge.

C. Payne, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The information purports to be based upon the written affidavit of W. L. Coker, filed with the information, and charges an aggravated assault and battery upon the person of one John Gillum, alleged to have been committed “on the 13th of September, 1877.” The affidavit of Coker charges an aggravated assault and battery by the accused upon one John Gillum, “on the 13th day of September, A. D. 187.” Agreeably to the record, and

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by which we are bound to be governed, the offence stated in the affidavit was committed 1,690 years before that stated in the information.

The accused moved the court below to quash the affidavit and information, on the reason, among others, that "the pretended affidavit shows that the pretended offence was committed in the year of our Lord 187, and that the information is bad without an affidavit that shows when the charged offence was committed."

The motion to quash was overruled. This was error. The variance between the affidavit and the information is fatal, and goes to the foundation of this prosecution. An information is void unless based upon a proper affidavit. *Dion v. The State*, 3 Texas Ct. App. 435. Both affidavit and information are indispensable. Gen. Laws 1876, p. 20, sec. 8. Neither can be dispensed with. In fact, the affidavit is the leading process, and is the basis upon which the information rests. *Blake v. The State*, 3 Texas Ct. App. 149.

Because of a material variance between the affidavit and the information, and because the affidavit charges an offence barred by limitation, the judgment is reversed and this prosecution dismissed.

Reversed and dismissed.

REDDIN COLLINS v. THE STATE.

1. AGGRAVATED ASSAULT—INFORMATION. — An assault or battery becomes aggravated when committed by an adult male upon the person of a female; and this is sufficiently charged in an information which alleges that the accused is an "adult male, and the said E. G. being then and there a female."
2. CHARGE OF COURT. — The accused has no right to complain of erroneous instructions given at his own request.

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3. **SAME.** — The penalty for the offence must be given in charge to the jury.
4. **SAME.** — Accused asked the court to instruct the jury that “no testimony of a former alleged offence by defendant can be taken into consideration in arriving at a verdict in this case.” *Held*, a proper instruction under the evidence, and error to refuse it.
5. **OATH TO JURY.** — Recital that the jury were “sworn to well and truly try the issue joined between the State and said defendant” imports that an unauthorized oath was administered to the jury, which vitiates the verdict and necessitates a reversal of a judgment of conviction.
6. **CLERKS** need not recite the oath administered to the jury, but when they do, the recital must not show that it was a different oath than that prescribed. Their duty in this matter, though simple, is important; and their attention is called to the cases of *Tharp v. The State*, 8 Texas Ct. App. 90, and *Leer v. The State*, 2 Texas Ct. App. 495.

APPEAL from the County Court of Hopkins. Tried below before the Hon. F. M. ROGERS, County Judge.

C. Payne, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The information charges the appellant with an aggravated assault and battery upon one Emeline Gillum, charging that the accused was an “adult male, and the said Emeline Gillum being then and there a female.”

The sufficiency of the information is questioned by a motion in arrest of judgment. It is said in the motion that the information fails to describe the offence charged with such certainty as will enable the accused to plead the judgment in bar of a second prosecution for the same offence. Other similar grounds are urged against the information.

The information evidently is intended to charge one of the grades of assault mentioned in the fifth subdivision of the 488th article of the Penal Code, which article prescribes the different circumstances under which an assault or battery becomes aggravated; and which subdivision is as follows:

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“ 5. When committed by an adult male upon the person of a female.” * * * Pasc. Dig., art. 2150.

The information states that the accused is an adult male, and that the person upon whom the assault is alleged to have been made is a female, which is in full compliance with the requirements of law. The information is sufficient, and there was no error in overruling the motion in arrest of judgment.

The instructions given by the court to the jury are shown by the record to have been asked by the defendant; and, if incorrect, it would seem he has no one to blame but himself. Still, there is one vital defect in the charge, which we feel called upon to notice. It does not appear from the record that the jury were informed in any manner as to the penalty imposed by law for the offence charged. This was a part of the law of the case, and upon it the jury should have been properly instructed.

The following charge was asked by the defendant, and refused by the court: “ No testimony of a former alleged offence by defendant can be taken into consideration in arriving at a verdict in this case.” We are of opinion, after examination of the evidence, as disclosed by the statement of facts, that this was a proper instruction, and that the court erred in refusing it.

The oath administered to the jury, as set out in the transcript, is that the jury were “ sworn to well and truly try the issue joined between the State and said defendant.” This is not the oath prescribed by law to be administered to a jury in any criminal case. See Code Cr. Proc., art. 563 (Pasc. Dig., art. 3029); *Clampitt v. The State*, 3 Texas Ct. App. 638; *Tharp et al. v. The State*, 3 Texas Ct. App. 90. For a sufficient statement of the swearing of a jury in a criminal trial, see *Leer v. The State*, 2 Texas Ct. App. 495.

When the record recites an oath other than that pre-

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scribed by law, it vitiates the verdict. It is not necessary to set out in the record the oath taken by the jury; but when it is set out, and it appears therefrom that other than the statutory oath was administered, the verdict must be set aside.

Special attention is invited to the case of *Tharp et al.* and *Leer's* case, above cited, and the remarks of the court in each, and the authorities there cited.

Inasmuch as the judgment must be reversed, we take occasion to notice that the evidence is not altogether satisfactory. The conviction upon the record before us cannot stand; and, for the reasons above set out, the judgment must be reversed and the cause remanded.

Reversed and remanded.

A. W. SWEENEY v. THE STATE.

1. PLEADING. — A motion to dismiss an appeal "because the transcript is not such as is required by law" is too general, and does not sufficiently point out the objections to the transcript.
2. RULES. — The same rules of practice which govern the District Courts of this State apply to the County Courts.
3. TRANSCRIPTS. — In preparing a transcript for appeal, the seal should be placed *over*, not *under*, the tie, and on some durable substance, capable of receiving and retaining its impress. When this requirement is disregarded, the clerk will be required to send up a new transcript, properly prepared.

APPEAL from the County Court of Morris. Tried below before the Hon. J. F. MOSELEY, County Judge.

As will be seen, the first opinion was rendered on a motion to dismiss; and subsequently, on a perfect transcript, the case was disposed of on the merits, by a second opinion.

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W. Banks and L. P. Wilson, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The assistant attorney-general moves to dismiss the appeal in this case “because the transcript is not such as is required by law.” This motion is too general, and does not sufficiently point out the objections to the transcript.

The same rules regulating appeals and proceedings in the District Courts govern the County Courts in this State. Gen. Laws Fifteenth Legislature, 22, sec. 19. On an examination of the transcript, the particular objection to it is the manner in which the seal of the County Court is affixed.

The attention of the clerk of the lower court is specially called to Rule 20, prescribed by the Supreme Court for District Courts, which is as follows:

“Transcripts shall be written on good paper, on one side only, and in a neat, legible hand, and sealed over the tie with the seal of the court.” 32 Texas, 819; 2 Pasc. Dig., art. 6202. In this case the impress of the seal is on the outside sheet of the transcript, and the tape which fastens it together is tied over the seal.

The transcript should be fastened together with tape, and be sealed over the tie, on some durable substance, capable of receiving and retaining the impress of the seal, in order that the transcript could not be tampered with,—that nothing could be added to or taken from it without being discovered, on an inspection of the same. The administration of the law and the ends of justice are often delayed, and sometimes defeated, on account of the carelessness and inexcusable negligence of officials in their most important duties. The motion to dismiss the appeal is overruled.

Regarding the imperfectly authenticated transcript as

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sufficient to have the cause retained on the docket, and adhering to the rule laid down by our Supreme Court in the case of *Rogers v. The State*, 43 Texas, 406, and followed by this court in the case of *Lockwood v. The State*, 1 Texas Ct. App. 751, the cause is retained on the docket, and the clerk of this court is instructed to notify the clerk below to send up a complete transcript of this case, properly authenticated.

This opinion applies also to the case of *Willis Cannon*, appellant, v. *The State of Texas*, appellee, No. 96, from the County Court of Morris County, in which the assistant attorney-general has also filed a motion to dismiss the appeal because the transcript is not such as is required by law.

Ordered accordingly.

WHITE, J. In this case the venue is not proved, and the judgment is therefore reversed and the cause remanded.

Reversed and remanded.

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MACK JOHNSON v. THE STATE.

1. **ARREST.** — Under the Code of this State, a peace officer is empowered to make an arrest without a warrant where a felony or a breach of the peace is committed in his presence or within his view, or when ordered verbally by a magistrate within whose presence or view such offences are committed, or when there is no time to procure a warrant, and the offender is about to escape. And these are the only cases wherein such authority exists, except when exercised for the prevention of offences, as prescribed in Paschal's Digest, arts. 2540 *et seq.* See the opinion *in extenso* on this subject.
2. **ASSAULT WITH INTENT TO MURDER — AGGRAVATED ASSAULT.** — An arrest was attempted by an unauthorized party, and in attempting to make it he was cut by the accused, who, in consequence, was convicted of an assault with intent to kill. *Held*, that the authority to arrest was a material question, and that such facts called for a charge on aggravated assault.

APPEAL from the District Court of Tarrant. Tried below before the Hon. J. A. CARROLL.

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The facts are substantially stated in the opinion of the court.

B. G. Johnson, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was convicted of an assault with intent to murder one John Whitt.

The facts in evidence, as shown by the record, are briefly these: John Whitt, the person upon whom the assault is charged to have been committed, was a night-watchman in the employment of merchants in the city of Fort Worth, Tarrant County. About one o'clock on the night of the 13th, and in the early morning of February 14, 1878, he heard loud talking and swearing in front of the Mobile Restaurant, in the city of Fort Worth, and went to the place from whence it proceeded. There he found one Charley Henry and one Billy Hines, boys employed at the restaurant, on the sidewalk. They appeared to be drinking; had pistols in their hands, which they were preparing to shoot off. Whitt attempted to arrest them. They said they would not be arrested; and, to prevent arrest, presented their pistols at him, and retreated into the restaurant, threatening to shoot Whitt if he followed them. Whitt then left the restaurant, and went some three blocks, to where Dick Peters, a regular policeman, was sleeping; woke him up, and they returned together to make the arrests.

When they arrived at the restaurant, Mrs. Michaelis, the owner of the restaurant, ordered them away, saying she did not want any fuss in her house that night. She testified that before policeman Peters arrived with Whitt, the boys, Henry and Hines, had gone to sleep in the loft over the kitchen; that her husband was away from home; that the

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defendant was in her employ, and had been put in control of the house for the night by her. Peters, the policeman, went up in the loft of the kitchen, arrested Henry, and handed him down to Whitt, to be carried to the lock-up. Henry resisted, striking Whitt a severe blow, and a regular scuffle, or fight, ensued between them in the kitchen; the stove, the oil-can, and other things were upset. Whitt finally succeeded in dragging Henry into the front room, and choked him up against the wall, when he cried out for help. At this moment Johnson, the defendant, approached Whitt and told him to let Henry alone. Whitt pushed defendant off; defendant got a butcher-knife from behind the counter, returned, and with it cut Whitt in the back. Whitt then turned Henry loose and left the premises.

Mrs. Michaelis also testified that, during the difficulty, Peters struck her in the face, and Whitt in the back. Quite a crowd was attracted by the difficulty. Whitt testified that neither he nor Peters struck Mrs. Michaelis. He further testified that he had no regular authority as a policeman; that he was authorized by the sheriff of Tarrant County, and by the city marshal of Fort Worth, to make arrests.

We have given so much of the evidence for the purpose, mainly, of presenting our view on one of the questions raised in the record. Defendant maintains that various errors were committed during the trial by the District Court. Passing over the first and second, we will proceed at once to the third error assigned, viz.: "The court erred in his charge to the jury, as contained in section 5 of the general instructions of the court, which is as follows: 'A police officer has a right to enter a house for the purpose of arresting any person known by him to have violated the law. Any person who may resist such police officer in the lawful discharge of his duty is a wrong-doer; and if, in mak-

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ing such resistance to such officer, he shall kill such officer, the offence is murder.' ”

This charge is not sufficiently qualified, and is not, we think, a fair exposition of the law applicable to the facts proven in this case ; and was calculated to mislead the jury, to the prejudice of the defendant. Neither Peters nor Whitt had any warrant for the arrest of Henry. The charge is a departure from the statutory rules laid down by our Code of Criminal Procedure for the arrest of offenders without warrant. The rules under which an arrest may be made by a peace officer, without warrant, are clearly and definitely defined. A peace officer may arrest without a warrant when a felony or a breach of the peace is committed in his presence or within his view, or when verbally ordered by a magistrate, within whose view or within whose presence a felony or breach of the peace is committed ; or in case of felony, where there is no time to procure a warrant, and the offender is about to escape. Pasc. Dig., arts. 2677, 2678, 2680.

These articles prescribe the only circumstances under which an arrest can be made by a peace officer without warrant, except when it is done for the prevention of offences as prescribed in articles 2540, 2544. In every other case the officer must be armed with a warrant before he can lawfully lay his hands on a citizen to deprive him of his liberty. No citizen of the State shall be deprived of his liberty except by due course of the law of the land. Bill of Rights, sec. 19. The law of the land only permits arrest to be made upon affidavit and warrant, except in those cases enumerated in the articles above cited. Whitt, as appears from the evidence, was neither a deputy sheriff nor policeman, and had no legal authority, as a peace officer, to arrest offenders. If any rules or ordinances have been adopted by the municipal authorities of the city of Fort

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Worth authorizing the arrest, without warrant, of offenders guilty of a felony, there is no evidence showing this in the transcript. There is no portion of the charge that instructed the jury under what circumstances any person not a peace officer could arrest an offender.

It is a well-established rule of the common law that when persons have authority to make arrest, and are resisted and killed in the proper exercise of such authority, the homicide is murder in all who take part in such resistance; and, on the other hand, it is equally as well settled that when the arrest is illegal the offence is reduced to manslaughter. And the general doctrine is that whatever one may do for himself he may do for another. Fost. 270; Hale's P. C. 465; *Rafferty v. The People*, 69 Ill. 111; 18 Am. Rep. 601; 2 Bishop's Cr. Law, sec. 665.

We can perceive no reason why, under our Criminal Code, the legality or the illegality of the arrest was not a material question in determining the character of the homicide, had death resulted from the wound inflicted upon Whitt by defendant in this case. If the evidence shows that the defendant, Johnson, was in charge of the restaurant at the time of the arrest; that the arrest was illegal; and that the acts and conduct of Peters and Whitt towards the inmates of the house were such as were calculated to, and did, excite his passion beyond his control; and that, under the influence of such sudden passion, the defendant cut Whitt with the knife, then he is not guilty of an assault with intent to murder, but of an aggravated assault and battery. A charge clearly presenting this view of the law should have been given to the jury in this case.

The judgment of the lower court is reversed and the cause is remanded.

Reversed and remanded.

Statement of the case.

J. G. L. DAVIS *et al.* v. THE STATE.

1. ALTERATION OF WRITTEN INSTRUMENTS. — If, on the face of an instrument offered in evidence, a material alteration is apparent, or if such an alteration be proved by extraneous evidence, the party offering and claiming under the instrument is bound to show that the alteration was made under such circumstances that it does not affect his right to recover.
2. BAIL-BOND — SCIRE FACIAS. — Sureties on a bail-bond, in answer to a *scire facias*, pleaded *non est factum*, and alleged that, without their knowledge, consent, or authority, the bond, since its execution, had been materially altered by the erasure of the name of another surety, against whom no judgment *nisi* had been taken; wherefore they were not liable. *Held*, a sufficient answer to the *scire facias*.

APPEAL from the District Court of Delta. Tried below before the Hon. W. H. ANDREWS.

This case was appealed to the Supreme Court in 1875, and, being undecided when the Constitution of 1876 went into effect, was transferred to the Court of Appeals, among the pending criminal causes.

William Davis was the principal in the bond, in the body of which the names of J. G. L. Davis and A. Sinclair alone appeared as the sureties. At the foot, however, it bore the signatures of these parties, and also those of W. D. Sheffield and R. C. Andrews. Sheffield's signature, however, was defaced by lines drawn across it, and he was not made a party defendant in the judgment *nisi* or the *scire facias*.

At the trial the defendants introduced the original bond, showing the obliterated signature of Sheffield, and one of them testified that when he signed the bond Sheffield's signature was to it; that Sheffield's name was not scratched when witness signed the bond, and it was fully understood that Sheffield was one of the sureties; and that witness did not know it had been scratched until the day he filed his answer to the *scire facias*.

The answers of the defendants set up the alteration, and

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were excepted to by the State for insufficiency, but no ruling on the exceptions appears in the record. The cause was heard and determined by the court without a jury, though no express waiver of a jury appears. Judgment was rendered for the State, and the defendants appealed.

Hale, Scott & Taylor, and Maxey, Lightfoot & Gill,
for the appellants.

A. J. Peeler, Assistant Attorney-General, for the State.

WHITE, J. It is now considered to be a general rule that where any suspicion is raised as to the genuineness of an altered instrument, or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. 1 Greenl. on Ev., sec. 564.

In the case under consideration, the sureties, in their answer to the *scire facias* issued on the judgment *nisi*, pleaded *non est factum*, alleging that since the execution by them of the bond, which was forfeited, the name of one of the sureties thereon had, without their authority, knowledge, or consent, been scratched out and erased, as was evident from the face of the instrument itself; that such alteration was unknown to defendants until after the rendition of the judgment *nisi*, and that judgment *nisi* had not been rendered against that other surety conjointly with these defendants; that the bond, which was their contract, had been thus materially changed, and that such change released them from all further liability upon it. In support of this plea the bond was produced in evidence, and fully sustained it, in connection with the oral testimony offered. On behalf of the State no evidence whatever was adduced. The court entered final judgment, and hence this appeal.

We are of opinion that the judgment is erroneous. The question here involved was the main one determined in

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Smith v. The United States, and it was said “that where the alteration is apparent on the face of the instrument, the party offering it in evidence and claiming under it is bound to show that the alteration was made under such circumstances that it does not affect his right to recover. * * *

The inquiry, therefore, is, What is the rule to be applied in a case where it appears that the contract of a surety has been altered without his knowledge or consent, and where it appears that the effect of the alteration is to augment his liability? Mr. Burge says that an alteration in the obligation of a contract, in respect to which a person becomes surety, extinguishes the obligation and discharges the surety, unless he has become by a subsequent stipulation a surety for, or has consented to, the contract as altered. (Burge on Suretyship, p. 214).” 2 Wall. 219.

And we may well adopt, as applicable to this case, the further remarks of Judge Clifford in that case. As was said by him, “authorities are not necessary to show that the alteration in this case was a material one, as it obviously increased the liability of the defendant; and in case of the default of the principal, and payment by the defendant, diminished his means of protection by the way of contribution; and the rule is universal that the alteration of an instrument in a material point by the party claiming under it, as by inserting or striking out names without the authority of the other parties concerned, renders the instrument void, unless subsequently ratified or approved.” 2 Wall. 234, citing *Boston v. Benson*, 12 Cush. 61.

As enunciatory of and illustrating the same doctrine, see Pars. on Notes & Bills, 577; 1 Greenl. on Ev., 10th ed., sec. 564; *Harper v. The State*, 7 Blackf. 61; *Barrington v. The Bank of Washington*, 14 Serg. & R. 405; *The People v. Buster*, 11 Cal. 215; *Miller v. Stewart*, 9 Wheat. 702; 4 Wash. 26; *Martin v. Thomas*, 24 How. 315; *Hardy v. Broaddus*, 35 Texas, 668; *Harper v. Stroud*, 41 Texas, 372.

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And in *Briggs & Briggs v. Glenn & Bryan*, 7 Mo. 572, it was held that “where a bond is altered or changed in a material part by the obligee, as by the erasure of the names of some of the obligors without the assent of the others, all the obligors are discharged.”

Several other irregularities committed on the trial are made apparent, on an inspection of the transcript of the record, which are not likely to arise on a subsequent trial.

The judgment of the court below will be reversed and the cause remanded, that the opportunity may be offered the State, on another trial, to obviate the objections to the judgment as above specified.

Reversed and remanded.

MOSES PROFFIT v. THE STATE.

CHARGE OF THE COURT. — When the general charge of the court covers all the different phases in which the case may be legitimately considered, in the light of the evidence, and presents the law applicable thereto in a clear and fair manner, it is not error to refuse special instructions.

APPEAL from the District Court of Harrison. Tried below before the Hon. A. J. BOOTY.

The appellant is charged by indictment with the murder of George Willis, in Harrison County, on October 1, 1874. He was convicted of murder in the second degree, and the punishment assessed against him, was confinement in the penitentiary for a term of twenty years. He and the deceased were freedmen.

Philip Brown, for the State, testified that he knew both deceased and appellant, and pointed the latter out to the jury. He remembers the day of deceased's death. On the morning of that day the deceased, who had been absent

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from the neighborhood some months, came to the house of witness and asked for the woman Joanna, with whom he had lived for many years before he went off, and whom he had left, when he went off, cropping with witness. Witness told deceased that the woman had lived with him (witness) ever since deceased left, until about two weeks previous, when she married appellant, and was now living and cropping with appellant. At this the deceased became very angry, and, after making several threats, said that he was going to her and get the things which he had given her. Witness cautioned deceased to do nothing wrong, and tried to dissuade him from it, inviting him at the same time to enter his (witness's) house and partake of breakfast. Deceased declined this invitation, and went off.

The next time witness saw deceased he was being chased by three or four dogs, and by the appellant, through a little strip of woods, down into the cotton-patch of witness, and towards a creek which runs between the place witness then occupied and Mr. William Winston's. At a point in a lane which runs north from the house of witness, and distant about one hundred and fifty yards, appellant dismounted from the horse he was riding, and with the dogs jumped the western fence of the lane. Appellant then whooped the dog on the deceased, and they all ran down through the strip of woods, down the hill, and into witness's cotton-patch, in the creek bottom. When the chase first commenced witness heard a pistol-shot, and almost immediately afterwards heard another, and both sounded from the direction in which the parties were running.

The dogs commenced barking and pursuing deceased as soon as appellant whooped at them, and at the same time witness, who was some two hundred yards distant, started across to intercept the parties, and prevent a difficulty if possible. When witness got down below the brow of the hill, and into the cotton-patch, he found deceased lying down

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on the ground, which showed marks of a struggle. When witness took hold of his head the deceased said: "Uncle Philip, take care of my things, and lay me down." Witness then noticed lying near him a dirk-knife, and a pistol, in which there remained two loads, which witness shot off. Just before witness got to where deceased was lying, he saw appellant sitting astride a fence, and heard him cry "help" just before he was seen by witness. Witness soon went to appellant, and found him badly stabbed in three or four places about the hips, abdomen, and side, and bloody from the waist down. Appellant was taken to witness's house, where he remained until he got well enough to go about, — some four weeks. Witness examined the body of deceased, and found a bullet-hole in his back and one in front, as if a bullet had passed entirely through his body. The hole in the back was somewhat higher up than the one in front.

The woman Joanna is the step-daughter of witness, — the daughter of his wife Caroline, — and since the "surrender," up to the time of deceased's leaving the neighborhood, had lived openly and notoriously as the wife of the deceased. Witness, from where he was when he saw appellant and the dogs jump the fence, could, and did, see George Campbell in the cotton-patch which said Campbell cultivated on Mr. Steve Terry's land, across the lane; and could, and did, see John James in the cotton-patch of witness, near the bridge, some three or four hundred yards from the house of witness. From where George Campbell was it was some one hundred and fifty yards to where appellant and the dogs jumped the fence. This happened in Harrison County, Texas.

On cross-examination, the witness said that the deceased, on the morning he called at the house of witness, threatened appellant, and talked very rough about him; and that the reason he (witness) attempted to dissuade him was

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because he feared he would do something wrong, as most any man would when another man had married his wife; had known deceased, appellant, and Joanna many years,—the first and last since before the war. Witness also testified that the deceased was a man of violent and dangerous character, and feared by both white and black people.

John James, for the State, testified that he remembered the day the deceased was killed. It was about nine o'clock on a cold, frosty morning, during the latter part of the year 1874. On that morning witness was in the Tom Terry field, cultivated then by Philip Brown, at a point south and west of, and near the bridge that crosses the creek in the lane that runs between Philip Brown's and W. E. Winston's places. Witness saw appellant riding across the bridge, followed by several dogs, and going towards Philip Brown's house. He had a pistol in his hand, and asked witness if he had seen the deceased that morning. Witness answered, "No;" to which appellant responded, "I am going to kill the d—n son of a b—h as soon as I see him." Appellant then rode on towards Philip Brown's, followed by the dogs, until he reached a point of the hill between where witness was and Brown's house, at which point he dismounted, and, with the dogs, got over the fence on the west side of the lane into Brown's wood-lot, when witness heard him whoop to the dogs, and heard the dogs yelp. Witness then saw appellant and the dogs running in a north-west direction, when presently they became lost to sight. Presently witness heard two shots, in rapid succession. Saw no more of deceased and appellant until he saw deceased dead and appellant wounded. Deceased was lying dead in Brown's field when witness got to him, with a bullet-hole through from his back to his chest. When appellant was carried to Brown's house, wounded, witness was asked to go for a doctor, which he did. Afterwards, and while wounded, appellant asked witness if deceased was dead,

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and upon being told that he was, responded that he (appellant) "was glad of it." The woman Joanna and deceased had lived together as man and wife for a long number of years before deceased left the neighborhood, some months before, and had generally been recognized as man and wife. Witness had been summoned before the grand jury in this case this fall, by a deputy sheriff.

On cross-examination, witness stated that he did not refuse to go for the doctor, when asked, for appellant, and did not say that appellant had as well die as deceased. Witness saw Mr. Steve Terry at Brown's house while appellant was there wounded, and told him that he (witness) had seen appellant and the dogs jump the fence, heard the appellant whoop on the dogs, heard them yelp, heard two shots, and saw deceased dead; and thinks he told him that appellant told him (witness) on the bridge that he (appellant) intended to kill deceased, having at the time a pistol in his hand.

George Campbell, on the part of the prosecution, testified that on the morning of the killing he was picking cotton in Steve Terry's cotton-patch, east of the lane and south of the bridge and creek. He saw the appellant riding from the direction of Philip Brown's house towards W. E. Winston's, and, as he passed through the lane, heard him say he was "going after a pistol, and kill the son of a b—h." Witness saw him again, coming from towards Winston's, with three or four dogs following him; saw him dismount, tie his horse, and, with his dogs, get over into Philip Brown's field, and heard him whoop on the dogs; heard the dogs yelp, and then saw deceased running, with the dogs and appellant after him. When the appellant was within fifty yards of deceased, witness saw him extend his arm, in the hand of which he saw a pistol, and heard a report. Appellant continued to run after the deceased, and shortly witness heard another shot. On going over the

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hill, witness found deceased dead in the field, shot through the body, and appellant badly wounded. Witness was some 400 yards distant when he heard appellant threaten deceased. Deceased was running down a steep hill when witness first saw him, with the dogs after him, and appellant fired first as they were going down this hill.

On cross-examination, the witness reiterated what he said on his examination in chief; but added that appellant was talking to himself, in an ordinary conversational tone, when witness, 400 yards distant, heard him say he would "kill the son of a b—h."

Giles Foster, for the State, testified that he knew the deceased and Joanna, and that they lived together as man and wife during the war, and afterwards until deceased left the neighborhood, some months before the killing.

On cross-examination, he said that himself and deceased belonged to the same man — Dr. Harris — in slave-time, and that he went with deceased to Mr. Godbold, who owned Joanna, when deceased asked Mr. Godbold for her. Consent was given, and the witness knows deceased and Joanna lived always after that as man and wife, up to the time deceased left the neighborhood. Witness could name no place where they so lived.

Caroline Brown, for the defence, testified that she is the wife of Philip Brown, and the mother of Joanna by another man. Joanna had lived with Philip Brown up to three or four weeks previous to the killing, when she married appellant and moved over to the Winston farm. On the day of the killing she (Joanna) had come over to Brown's to cook for the men who were picking cotton, and appellant came over with her. Appellant went into the kitchen to build a fire, preparatory to the preparation of breakfast, and while out there deceased came in and asked witness and Joanna whose horse that was hitched at the gate. Witness answered that it was appellant's. Deceased then asked

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Joanna if she had married appellant, and on being answered in the affirmative, said: "I will kill him before the sun goes down, or he will kill me." Deceased then displayed a dirk-knife, and started out of the house; but hearing a noise in the kitchen, asked, "Who is that?" Witness answered that it was appellant. Deceased turned immediately towards the kitchen and started in, but witness and Joanna got before him, and begged him to go away and have no fuss during Brown's absence. Deceased persisted in his efforts to get into the kitchen, but finally turned and went off. Appellant heard all that the deceased said, and saw him making efforts to get into the kitchen. Some time after deceased went off, appellant got on his horse and rode off, and witness saw no more of him until he was brought to Brown's house, badly wounded. Saw no more of deceased. Between ten and eleven o'clock, to the best of witness's belief, she heard a shot; saw nor heard no dogs. Joanna never claimed deceased for her husband, that witness knows of.

On cross-examination, she said appellant had a pistol when he left the house. Witness heard the shot a few minutes after appellant rode off, in a north-westerly direction from Brown's house.

Joanna Proffit, wife of appellant, testifying for the defence, corroborated the testimony of the last witness entirely, but added that when deceased left Brown's house she went into the kitchen and told the appellant what he had said, but that appellant had both heard and seen the deceased. Witness further stated that when appellant left the house he said he was going home. Witness saw appellant no more until he was brought back badly wounded, and then she asked John James to go for the doctor, which he refused to do, until she begged and entreated him. Both James and Philip Brown said appellant had as well die as deceased. When witness got home, she found that some

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one had broken into her house and taken off everything she had, except a large bedstead, and a box which was burned. Had never lived with deceased as his wife in Shreveport. On cross-examination, she testified that she had not seen deceased, before the day of the killing, for eight or nine months.

Dr. O. Knox, for the defence, testified that deceased and Joanna had never lived together as man and wife, though he has heard it said in the neighborhood, 'since the war, that deceased claimed her as his wife. Joanna lived on witness's place in 1863 or 1864, and deceased did not then claim her as his wife, though witness thinks he was at his house twice while Joanna was there, but does not know that deceased came to see Joanna; thinks, however, that he did. Has known deceased many years. He was a violent and dangerous man, and the terror of the neighborhood to both white and black. Knows Giles Foster, whose reputation for truth and veracity is bad, and who is not to be believed on oath.

William Winston, for the defence, testified that he has known appellant for thirty years, and has never known a more quiet and peaceable man. He had married Joanna about three weeks before the death of deceased; lived then, and lives now, on witness's place. Witness's dogs were in the habit of following him. Did not borrow witness's pistol on the day of the killing. Witness noticed on that day that the house of appellant and Joanna, which is on his place, had been recently broken into, through the window; and saw, also, that things of appellant and Joanna had been taken out and freshly burned.

Stephen Terry, for the defence, testified that he owned the place opposite the Tom Terry place, on which Philip Brown lived in 1874. A lane runs between the places; witness's farm lay on the east and Tom Terry's on the west of the lane. The west boundary-line of witness is a

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levee, from five to six feet high, with a plank fence about three feet high on top of the levee. After getting off the bridge in the lane, going south, a person travelling on foot could not be seen for several hundred yards. If the person travelling the lane were on horseback, any one from the field might see the top of the rider's head — certainly not more than from the shoulders up — until such rider should get on top of the hill where Brown lived. Witness was in the field when deceased was killed, near the bridge; did not see either deceased or appellant on that day; thinks if any one on horseback had crossed the bridge that day, and stopped on it to talk to another, he would certainly have seen him. Witness heard a gun fire on the morning of the day deceased was killed, but heard no dogs yelping, nor heard any one whooping dogs. On that evening Philip Brown sent for witness, and told him deceased was dead. Witness found deceased dead in the field, near a spot where the ground indicated a struggle. Deceased appeared to be shot through his body, from his back. Witness tracked the blood clear up to Brown's house, where he found appellant wounded. Saw Philip Brown, John James, and George Campbell at the house, all of whom told witness they didn't know how it occurred; that they saw the dogs jump the fence and defendant running, which was all they knew about it. Knew deceased well; he was a violent and dangerous man, — the terror of white and black people of the whole neighborhood.

No brief for the appellant has reached the reporters.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. Appellant, Moses Proffit, was indicted by the grand jury of Harrison County on November 28, 1877, for the murder of one George Willis, alleged to have been committed by the accused on October 1, 1874.

Syllabus.

The trial, which concluded on December 21, 1877, resulted in defendant's conviction of murder in the 'second degree, with his punishment assessed at twenty years' confinement in the penitentiary, and judgment was rendered accordingly.

The case seems to have been tried with more than ordinary care and ability, and a most thorough examination of the record convinces us that the errors complained of are not maintainable. A principal ground of complaint is the refusal of the court to give in charge to the jury the special instructions asked by defendant. It is not necessary that we should discuss these instructions. Suffice it to say that the general charge, as given, covered all the different phases in which the case could be legitimately considered in the light of the evidence, and presented the law applicable thereto in a most clear, forcible, and able manner, and certainly with great fairness for the defendant. Such of the special instructions as were not embraced in the charge were, in our opinion, not a part of the law of the case, or were not warranted by the facts proven. The court, therefore, did not err in refusing to give them.

The defendant appears to have had a fair and impartial trial, and there is a sufficiency of evidence to sustain the verdict and judgment. The judgment is, therefore, affirmed.

Affirmed.

FRANK KIRBIE *et al.* v. THE STATE.

1. FALSE IMPRISONMENT. — In a trial for false imprisonment the prosecution need prove no more than the imprisonment, for that is presumed to be unlawful until the contrary is shown. It is for the defence to justify, by proving that it was lawful.
2. WARRANT. — Persons called upon, by an officer holding a warrant, to assist in the search for and arrest of a party charged with crime, are protected, whether they had the warrant at the time of arrest or not. A volunteer, however, is held to knowledge of his right to interfere, and acts at his peril. The guilt or innocence of the arrested party is an immaterial inquiry in the trial for his false imprisonment.

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APPEAL from Parker County Court. Tried below before the Hon. B. L. RICHEY, County Judge.

McCall & McCall, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. This is an appeal from a judgment of conviction upon a charge of false imprisonment of one J. M. Parker. On the trial below, the defendants attempted to justify by proving that, at the time of the offence charged against them, the constable of the precinct held a warrant for the arrest of Parker, and that the defendants were of the constable's *posse*, aiding him in searching for and arresting Parker, and, as such, were protected by law in doing the acts upon which the false imprisonment is assigned.

It appears from the statement of facts and bills of exception to the rulings of the court on the evidence, as well as from the charges given to the jury, and those asked by the defendants and refused by the court, that the trial was made to turn upon the evidence as to whether the defendants were of the constable's *posse* or not. No serious question is made as to the facts, that a regular warrant for the arrest of Parker had been issued by a justice of the peace, founded upon an affidavit charging Parker with an assault with intent to murder; that the warrant had been placed in the hands of the constable; and that, at the time of the offence charged against these defendants, it was in the hands of the constable, or of some one called upon by him to aid in making the arrest.

Upon the vital question the jury were instructed as follows: "If the jury believe that these defendants were called upon by the officer having the warrant of arrest to assist such officer in hunting up the defendant (Parker) in the warrant, or in making the arrest, and if they were em-

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ployed and recognized by the officer having the warrant, it makes no difference whether the defendants had the warrant at the time of the arrest of Parker or not; in such instance the defendants are not guilty of the crime charged in the indictment, and the jury will acquit."

Additional instructions were asked by the defendants and refused by the court, which, on comparing them with the charge given, embrace no further views than those expressed in the general charge, except the idea, apparently, that if the defendants believed they were protected by the warrant they could not be convicted. We are of opinion that when one is a mere volunteer, he is held to knowledge of his right to interfere; and if the protection is to be afforded by a warrant in the hands of another, and if he interfered, he did so at his peril. There are cases where any person may arrest without warrant, but it is not claimed that the present case belongs to that class.

We are of opinion that the charge of the court, as above set out, gave to the defendants the benefit of all the protection the law afforded those who claimed the shield of the warrant of arrest. Whether the charge did not go too far is not the question. If there was error in it, it enured to the benefit of the defendants, and they cannot be heard to complain. There was no bill of exceptions saved to the charge as given.

It is shown by a bill of exceptions that, on the trial below, the defendants called for the production of the transcript of the proceedings, in the hands of the district clerk, of the case of *The State v. Parker*, which was objected to by the prosecution because irrelevant. The judge, in signing the bill of exceptions, states, in effect, that the matter was waived; that one of the counsel stated he believed he could make the desired proof by witnesses present, which, he says, was "the last time the warrant was called for, and which was not refused by the court." Another bill of

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exceptions recites that after Justice Jewell had stated, on his examination in chief, that he had issued a writ for J. M. Parker, on a charge of assault with intent to murder William Phillips, he desired to prove by the witness, on cross-examination, that Parker had been tried and bound over to await the grand jury; which was excluded because irrelevant.

In this there was no error. The *status* of the defendant was fixed at the time of the arrest, and did not depend on the final result of the charge upon which the arrest was made.

In the present case it is conceded by the charge — based, we may say, upon the evidence — that at the time of the interference by these defendants a warrant had issued for the arrest of Parker, the validity of which is not questioned, and that the warrant, agreeably to the charge, was sufficient to protect the *posse* of the constable; but the case, as we have seen, turned on the question whether the defendants had been called on to aid in the search and arrest of Parker. The jury, by their verdict, must necessarily have determined in their own minds that the defendants did not stand in such relation to the officer, else they could not have convicted under the charge of the court.

Agreeably to Mr. Archbold, “all the prosecution has to prove is the imprisonment, for that is presumed to be unlawful until the contrary is shown. It is for the defendants to justify it, by proving that it was lawful.” 2 Arch. Cr. Pr. & Pl. 293.

There was some conflict in the evidence as to the instructions given by the officer to those engaged in the search, but with this it was the business of the jury to deal. There was sufficient testimony to support the verdict; and, the record not disclosing any material error, the judgment is affirmed.

Affirmed.

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WALKER BUSH v. THE STATE.

1. PRACTICE. — Unless the transcript shows that the plea of “not guilty” was entered, a conviction will not stand.
2. DISTURBING RELIGIOUS WORSHIP. — The indictment charges that the accused “heretofore, to wit, on the 1st day of December, A. D. 1876, in the county of H., and State of T., did wilfully disturb a congregation assembled for religious worship, and conducting themselves in a lawful manner, by loud and vociferous talking,” etc. *Held*, a sufficient allegation as to time, place, and manner.

APPEAL from the County Court of Hamilton. Tried below before the Hon. D. C. SMITH, County Judge.

Eidson & Pierson, for the appellant, in support of the motion to quash the indictment because it fails to show the *place* where the congregation was assembled, cite 2 Texas Ct. App. 422, 512.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. The charge set out in the indictment is in these words: “That heretofore, to wit, on the 1st day of December, A. D. 1876, in the county of Hamilton, and State of Texas, Walker Bush and C. C. Prater did wilfully disturb a congregation assembled for religious worship, and conducting themselves in a lawful manner, by loud and vociferous talking and quarrelling.”

In our opinion, the indictment is sufficient under the statute of April 23, 1874. Gen. Laws Thirteenth Legislature, 43; *Corley v. The State*, 3 Texas Ct. App. 412. The court did not err in overruling defendant’s motion to quash.

The judgment must, however, necessarily be reversed, for the reason that the record nowhere discloses that the defendant on the trial pleaded, or that a plea was interposed for him under the statute. *Stacey v. The State*, 3 Texas Ct. App. 121; *Everett v. The State*, 4 Texas Ct. App. 307.

Reversed and remanded.

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FRANK WEBB v. THE STATE.

CHARGE OF THE COURT.—In a trial for theft, the court below charged the jury that “the credibility of witnesses and weight of evidence are committed entirely to the jury, and by their conclusions therein, under the law given them by the court in charge, they should determine their verdict.” *Held*, that the charge is not amenable to the objection that it authorized the jury to determine their verdict upon the mere weight of evidence, and enunciated no more than the language of the Code.

APPEAL from the Criminal District Court of Galveston.
Tried below before the Hon. G. Cook.

The indictment and conviction were for theft of personal property over the value of \$20, and the punishment assessed was two years in the penitentiary.

J. R. Burns, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. Appellant in this case was tried and convicted of theft of personal property over the value of \$20, and his punishment was affixed at imprisonment in the penitentiary for a term of two years.

Several interesting questions are discussed in the brief of counsel for the accused, which, in our opinion, do not legitimately arise when the transcript of the record is examined in connection with them. At all events, we cannot concur in the position contended for by counsel, that the record before us leaves it in doubt, or even questionable, that (1) the defendant was present at the rendition of the verdict; or, (2) that the venue was proven; or, (3) that defendant was asked what he had to say why sentence should not be pronounced or judgment rendered against him in accordance with the verdict of the jury. On the contrary,

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in our opinion, each of these facts is made to appear, not only affirmatively, but quite pointedly; and it would be a contradiction of the plainest deductions to be made from the language used in the recitals, both of the preliminary and final judgments in the case, to hold otherwise. To arrive at this conclusion it is not necessary to resort to any presumptions whatever, since the facts are so substantially stated to exist.

The preliminary judgment states that defendant was present in person and by attorney when he announced ready for trial; when the jury were empanelled, "accepted by him," and sworn; and that when the evidence was closed, argument and charge of the court heard, and the jury, after retirement and consideration, had returned their verdict into court, that the court then ordered that the defendant be remanded into the custody of the sheriff. If he was not in court during the whole of these proceedings, and was not present at the rendition of the verdict, why remand him again into the custody of the sheriff? Or where is there a single ground upon which, in the face of these recitals, to postulate presumption that he was absent at any time from the court-room, from the very inception to the close of these proceedings? There does not appear to have been any interval or adjournment during the trial. Under the circumstances, to have restated that the defendant was still present when the verdict was read would have been but an iteration and reiteration of a fact already patent, and, as we have seen, clearly stated.

With regard to the venue, the prosecuting witness, Bird, gave a detailed statement of the facts connected with the theft of the articles alleged to have been stolen, together with the discovery of the chain in possession of defendant, and his confession that he had stolen it; and he concluded his testimony by saying, "all this occurred in Galveston County, Texas." This, it is contended, does not prove the

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venue. We are of opinion that it does, and that the reasoning and criticism of counsel on the subject are hypercritical.

Our statute provides that, “before pronouncing sentence in a case of felony, the defendant shall be asked whether he has anything to say why judgment should not be rendered, and sentence pronounced against him.” Pasc. Dig., art. 3152.

We take it that the appeal in this case was not from the sentence, but from a final judgment, such as is ordinarily rendered in cases where the prisoner appeals without sentence, the sentence being generally suspended until the result of the appeal is known. Pasc. Dig., arts. 3213, 3214. The statute also provides for appeals after sentence pronounced. Pasc. Dig., art. 3192.

In the case at bar the final judgment, after the usual formulary, uses the words, “and saying nothing why the judgment of the court should not be pronounced against him,”—clearly showing, if it had been necessary to do so in rendering such a judgment, that the accused had in fact been asked what, if anything, he had to say why judgment should not be rendered.

The remaining objection is, “that the charge of the court is erroneous, in this: it authorized the jury to base their conclusion upon the mere weight of evidence.” The language of the charge alluded to in this objection is as follows, viz.: “The credibility of witnesses and weight of evidence are committed entirely to the jury, and by their conclusions thereon, under the law given them by the court in charge, they should determine their verdict.” It seems to us that this charge enunciated nothing more than a plain proposition of law, which is laid down in our Code of Criminal Procedure in these words: “The jury in all cases are the exclusive judges of the facts proved and the weight to be given to the evidence.” Pasc. Dig., art. 3108.

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Really, there appears nothing whatever in the record subject to any just ground of complaint. The defendant is evidently guilty under the testimony, and according to his own confession besides. He has had a fair and impartial trial, and, so far as we can see, justly merits the punishment awarded him. The judgment is affirmed.

Affirmed.

J. D. JINKS v. THE STATE.

1. **ARREST OF JUDGMENT.** — The objection that the indictment was not properly presented in open court by a quorum of the grand jury comes too late when made for the first time by motion in arrest of judgment. Had this objection, if tenable, been made at the proper time, before a waiver by plea of "not guilty," the indictment should have been quashed.
2. **THEFT — INDICTMENT.** — It is a well-settled principle of law that when one person has the general and another a special property in the thing stolen, an indictment for theft of it may allege the property in either.
3. **SAME — SPECIAL OWNERSHIP.** — A person who, in conformity with the estray laws, has taken up and holds an estray, has a special property in the animal, and an indictment for theft of it may allege him to be the owner.
4. **EVIDENCE.** — It is well settled that the facts and circumstances attending the theft may be given in evidence, and that proof of the special ownership in the one holding the special property will sustain the averment that he is the owner.

APPEAL from the District Court of Hunt. Tried below before the Hon. G. J. CLARK.

The indictment charges the appellant with the theft of a calf, the property of one Thomas Rattan, from his possession.

The testimony discloses that during the month of December, 1873, Rattan took up and estrayed a certain heifer. It is further disclosed that after the heifer was estrayed she gave birth to the calf alleged to have been stolen by appellant from the possession of Rattan, the taker-up. It further appears that, at the sale under the estray law, the heifer was purchased by Rattan, the prosecuting witness.

Argument for the State.

Jones & Lewis, for the appellant, file an able brief, insisting that the indictment is defective, in that it charged the ownership of the calf in Tom Rattan, whereas it should have charged the possession in Rattan, as holding it for the owner, who was unknown. Counsel quote so much of the testimony of Rattan as shows him to have estrayed the mother of the calf before it was born, and wherein he claims to have had the calf in "his possession and under his control" by virtue of the estrayal. The counsel dispute the assumption of the State that Rattan, by virtue of his estrayal of the mother, became invested with such a qualified or special property in the calf as to warrant the allegation of ownership in him, and insist that, before he could become invested with the title, and, consequently, the possession of the animal alleged to have been stolen, he must be shown to have complied with the estray laws of this State. See 2 Pasc. Dig. 1394. The first section of this act provides that when any animal, coming within the definition of an estray, shall be found on the plantation or land of any citizen of this State, said citizen may proceed forthwith to advertise the same, etc., — thus providing that such animal must be shown to have been taken up on the plantation or land of the citizen seeking to estray it. And the second section of this act provides that oath must be made to the facts alleged as entitling the citizen to estray the animal. Counsel urge that unless this oath is made, as required by the second section of the act referred to, Rattan in this case was not entitled to the ownership and possession, and that the averment of ownership in him is fatal to the indictment.

George McCormick, Assistant Attorney-General, for the State, insists that it is not necessary that the possession and ownership be in the same person, and that possession is constituted by the exercise of actual control, care, or man-

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agement of the property, whether the same be lawful or not (Pasc. Dig., arts. 2386, 2387); that Rattan had such a special property in the animal stolen as will support the allegation of ownership in the indictment. *Moseley v. The State*, 42 Texas, 78; *Cox v. The State*, 43 Texas, 101; Bishop's Cr. Law, sec. 789; 2 Whart. Cr. Law, sec. 1830; 2 Bishop's Cr. Proc., sec. 720, and notes; *Pitts v. The State*, 3 Texas Ct. App. 210.

Further, that it would be no defence to this action against appellant if Rattan had himself, in the first instance, stolen the animal from the true owner. Pasc. Dig., art. 2387, and authorities quoted in 2 Bishop's Cr. Proc. 721, note 2.

WINKLER, J. The several grounds upon which the appellant relies for a reversal of the judgment, though presented in various forms, and at different stages of the proceedings below, resolve themselves into three material questions necessary to be considered.

1. Does the record show a proper presentation of the indictment by the grand jury?

2. Was the evidence admissible under the averments in the indictment, and in immediate connection with them?

3. Was the charge to the jury a correct enunciation of the principles of law applicable to the case as made by the pleadings and the evidence, or a charge upon the weight of evidence?

As to the first question, little need be said further than this: The question is raised for the first time in a motion in arrest of judgment. A similar question arose and was carefully considered by this court in a most grave and serious matter, involving life itself, — *Houillion v. The State*, — and, upon a review of other cases, it was held that the objection that the record did not show a proper presentation of the indictment by the grand jury came too late when presented, as in the present case, for the first time by

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motion in arrest of judgment. 3 Texas Ct. App. 537. Questions of this character must be made at the proper time, and in the manner prescribed by the Code of Procedure, arts. 483, 485, 498 (Pasc. Dig., arts. 2950, 2951, 2967). The ground of objection, if tenable, should have been promptly met, as was done in *Hardy v. The State*, 1 Texas Ct. App. 556, and in *Denton v. The State*, 3 Texas Ct. App. 635.

The second and third more important questions are to the admissibility of the evidence under the averments of the indictment, involving the effect of the testimony and the sufficiency of the charge of the court. The indictment charges that the defendant "did unlawfully and fraudulently steal, take, and carry away from and out of the possession of one Tom Rattan, without his consent, one calf, of the value of five dollars, the said calf being of the cattle kind, and corporeal personal property of the said Tom Rattan," with intent, etc.

The prosecuting witness, Tom Rattan, testified, among other things, that the calf was taken without his knowledge or consent, and says: "The calf was under my control and in my possession this way: The fall before, I believe in the month of December, 1873, I had estrayed the mother of the calf I lost. * * * I had possession of the calf and her mother as estrays." The record was produced to show that Rattan had estrayed the mother, and there was proof that the calf alleged to have been stolen was the calf of the cow estrayed by Rattan. A bill of exceptions was taken to the admission of Rattan's testimony and to the record of the stray proceedings.

The court instructed the jury, among other things, that "when one person is the rightful owner of property, and another has the possession and control thereof, the person thus in possession is the owner of the property as against all wrong-doers. And the jury are charged that the rec-

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ords read to them as evidence in this case are sufficient evidence that Thomas Rattan was the owner of the cattle therein mentioned as estrays and posted by him, as against everybody except the rightful owner of the same, and this would be the case even if there were some irregularities in the mode of estraying the cattle; and a person stealing them from him would be a taking from the possession of the owner, in contemplation of law defining theft."

The effect of this instruction was to inform the jury, first, that if Rattan held the animal as an estray, his possession and control in that manner would support an indictment charging that he was the owner; and, secondly, that the record introduced was proper evidence of the fact that Rattan had estrayed the property mentioned in the record, notwithstanding some of the proceedings might appear irregular. The charge above set out was followed immediately by a further charge, to this effect: "And if the jury believe from the evidence that the calf charged to have been stolen was the offspring of a cow which Thomas Rattan had estrayed," etc., then he would be guilty. With this addition, there was nothing in the charge, when taken altogether, and especially in view of other portions most favorable to the defendant, calculated to mislead; nor was it a charge upon the weight of the evidence. The charge was a correct enunciation of the law of the case, as made by the pleadings and the evidence. And the evidence was admissible, and sufficient to sustain the averment of ownership as alleged in the indictment. The appellant's counsel insist that the indictment should have charged that Rattan was holding the property for the owner.

Theft, agreeably to the provisions of the Penal Code, is defined to be the fraudulent taking of corporeal personal property belonging to another, either from the possession of the owner, or from the possession of some person holding the same for the owner, under the other circumstances

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mentioned in the Code. Art. 745 (Pasc. Dig. 2381). From the time Rattan estrayed the property up to the date of sale under the stray laws he was holding the property for the owner, and subject to reclamation by him on proper proof; and from the date of sale, he, being the purchaser, became the owner of the property himself. In either event his possession was legal, and the law protected his possession against all persons except the rightful owner to the time of the stray sale; and, having such legal possession, it was proper to allege in the indictment that he was the owner of the property.

In the case of *Moseley v. The State*, 42 Texas, 78, it was held that, in an indictment for theft, the stolen property may be alleged in the indictment to belong to one who had but a special property in it at the time it was stolen; and in *Cox v. The State*, 43 Texas, 101, in some respects quite similar to the present case, Reeves, A. J., delivering the opinion of the court, says: "The court instructed the jury, in substance, that Marchant, the alleged owner, acquired such special property in the gelding, on complying with the stray law, as would be sufficient to support the allegation of ownership as charged in the indictment. The rule is well settled, where one person has the general and another the special property in the thing stolen, the indictment may allege the property in either."

In *Maddox v. The State*, where the indictment was for theft of a buggy and two mules, and the proof showed that the defendant had obtained the property by hiring, an objection kindred to the objection here was taken to the evidence, the point of objection being that the indictment did not aver that the taking, though originally lawful, was obtained by some false pretext, or with intent to deprive the owner of his property; and the court say: "The taking, as defined in article 2385, does not describe a different offence from that defined by article 2381, but only differs in its facts and circumstances, which are matters of proof, and

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need not be averred in the indictment." 41 Texas, 205. And see, to same effect, *Berg v. The State*, 2 Texas Ct. App. 148; *Culberson v. The State*, 2 Texas Ct. App. 324; 3 Greenl. on Ev., sec. 161. It would be competent even to charge that the property belonged to some person to the grand jurors unknown. See Culberson's case, above; 2 Bishop's Cr. Law, sec. 800.

The law seems well settled, first, that in an indictment for theft, the ownership of the property alleged to have been stolen may be averred to be in either the one having the general or in him who has a special property in the thing stolen; and, second, that the facts and circumstances attending the theft may be given in evidence, and that proof of ownership in the person holding a special property in it would sustain an averment that he was the owner. Finding no material error in the proceedings, the judgment is affirmed.

Affirmed.

RAS BURKE v. THE STATE.

1. **INDICTMENT.** — Surplusage may be eliminated from an indictment without affecting it, where the averments are sufficient to apprise the defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution.
2. **SAME — BURGLARIOUS ENTRY WITH INTENT TO COMMIT RAPE.** — The indictment charges defendant with "unlawfully, feloniously, and burglariously" entering the house of J. M. R., "there situate, with intent, then and there, unlawfully, feloniously, and burglariously, and against the will" of A. L., her, the said A. L., to ravish and carnally know, etc. *Held*, sufficient to charge the intent. While, under an indictment for *assault* with intent to rape, the corporeal, personal presence of the female at the time and place of the assault would be indispensable, it is not so under an indictment for burglarious *entry* with intent to commit rape. The evidence may show the *intent* in forcing the entry into the house, and as the intent constitutes the gist of the offence, the actual presence of the female is immaterial.
3. **BURGLARY — ENTRY.** — Entry, under our statute, does not signify the

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entrance of the whole body, but may consist in the entry of any part of the body, for the purpose of committing a felony.

4. **SAME—FORCE.**—The slightest force will constitute breaking. It may be by lifting the latch of a closed door, raising a window, the entry at a chimney, or other unusual place.

APPEAL from the District Court of McLennan. Tried below before the Hon. L. C. ALEXANDER.

The testimony of the prosecutrix shows that the appellant, in the early morning of the day charged in the indictment, came to the window of the room in which witness was sleeping, broke out a pane of glass, and removed the stick which was placed above the lower sash to secure it, and placed it under the sash, having raised it, to keep it up. Witness screamed, asked appellant, “Who are you, and what do you want?” to which appellant responded, “If you don’t hush I will kill you;” whereupon witness screamed again, and called for the proprietor of the house. The witness identified the appellant.

J. M. Reviere, the proprietor, testifies that he heard the screams of the first witness, and on coming out of his room to the gallery, saw a man making his escape through the gate. On learning from the prosecuting witness the cause of her alarm, he examined the window and found the lower sash raised, and held up by a stick that was used to confine it when down; and found one pane of glass broken out, and bits of glass scattered about. Witness also found an inverted box under the window, on the outside.

Defendant’s counsel attempted to prove that defendant was mentally incapable of distinguishing right from wrong, by showing that on one occasion he gave his age as “thirty, going on twenty,” and by showing eccentricities in his conduct.

Clark & Dyer, for the appellant.

George McCormick, Assistant Attorney-General, and *W. B. Dunham*, for the State.

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WHITE, J. Appellant was indicted, under article 724 of the Penal Code (Pasc. Dig., art. 2359; Gen. Laws Fifteenth Legislature, 231), for burglary, the breaking into the house having been accomplished with the intent to commit rape. The statute, as now amended, reads as follows: "The offence of burglary is constituted by entering a house by force, threats, or fraud, at night; or in like manner by entering a house during the day and remaining concealed therein until night, with the intent, in either case, of committing a felony or the crime of theft." Acts Fifteenth Legislature, 231.

As stated in the indictment, the charge reads: "That Ras Burke, late of said county, on the second day of April, A. D. eighteen hundred and seventy-eight, with force and arms, in the county and State aforesaid, did then and there, unlawfully, feloniously, and burglariously, about the hour of four o'clock at night of said second day of April, A. D. 1878, break *and a window pane out of the window*, and did hoist the window and enter the dwelling-house of John M. Reviere, there situate, with intent then and there, unlawfully, feloniously, and burglariously, and against the will and consent of Agnette Ingstad, her, the said Agnette Ingstad, to ravish, and carnally know, by force and threats, and by assaulting and threatening to take the life of her, the said Agnette Ingstad, contrary," etc.

The objections to this indictment, as presented in the motion in arrest of judgment, which was overruled, and as insisted upon with great force in the able brief of the counsel for appellant, are that the allegations quoted are insufficient.

We believe that the words, "and a window pane out of the window," which we have italicized above, are meaningless, and can and should be stricken from the indictment as surplusage. 1 Bishop's Cr. Proc., sec. 478; *Coleman v. The State*, 2 Texas Ct. App. 512. We shall consider and treat them as stricken out.

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The first objection to the indictment, then, is that it fails to aver that Agnette Ingstad, the woman intended to be ravished by defendant, *was in the house*, or that the intent was to ravish her *in the house*. In our opinion, these objections are not well founded. The words "with intent then and there," connect all the way through with the words "her, the said Agnette Ingstad, to ravish and carnally know." If it be conceded that it is absolutely essential that an indictment of this character should fix by positive averment the *situs* of the female intended to be assaulted, then, we think, a fair construction of the language of the charge fully meets the requirement. In this regard the indictment conforms to the precedent approved by Mr. Wharton, in his standard work on Precedents, 376, 377.

We can readily imagine a case where a party might commit and be legally convicted of a burglarious entry with intent to commit rape, where the female intended to be ravished was actually not in the house at the time of the entry. It is the intent which constitutes the gist of the crime, and this intent is a matter to be ascertained and determined by the jury, from all the facts and circumstances in evidence before them. *Dibrell v. The State*, 3 Texas Ct. App. 456; *Coleman v. The State*, 2 Texas Ct. App. 512.

If the charge was an *assault* with intent to commit a rape, we grant that the corporeal personal presence of the female, at the time and place when and where the assault was made, would be indispensable to the proof, and equally as essential, by way of allegation, to the indictment. Not so, we imagine, in a case like the one under consideration. A party may deliberately plan, and, in fact, go so far towards consummation of his purposes as to break into a house in the night-time with intent to commit rape, and all the facts and circumstances may show that that, and that alone, was his intention, though at the time the female, unknown to him, was not in the house; and yet, because she happened

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to be absent at the time of such entry and his detection, will it be insisted that a jury would not be warranted in finding him guilty of burglary, with such felonious intent? If the entry in the house was effected in the day-time, and the party concealed himself therein until night, as we have seen from the statute quoted, he is guilty of burglary if his intent was felonious; and if rape was his purpose, his guilt would be complete and conviction sustained though the female intended to be ravished had not entered the house prior to his detection, so that the facts established to the satisfaction of the jury that such must have been and was his intention.

In either of these supposed cases it would hardly be expected that the intelligent pleader, knowing the facts, and the necessity of conforming his averments to them, would allege the presence of the female in the room or house at the time of such entry.

It will appear that when the italicised words which we have denounced as surplussage are eliminated, it becomes too plain for argument that the other remaining objections to the sufficiency of the indictment are without foundation, and, being so, require no discussion at our hands.

No objection is raised to the charge of the court, nor indeed could be. It is perfect and complete in all its parts and as a whole, and most ably presented the law applicable to the facts.

The sufficiency of the evidence is denied, and it is specially insisted that it fails to support the allegations, either of entry or that the burglarious intent was to ravish Agnette Ingstad. The proof of entry, we think, comes up fully to the standard measure of the statute. Article 726 of the Penal Code (Pasc. Dig., art. 2362) reads: "The entry is not confined to the entrance of the whole body; it may consist of the entry of any part, for the purpose of committing a felony." And again, article 2363, Paschal's Digest, is as follows: "By the term *breaking*, as used in

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article 725, is meant that the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of the door that is shut, by raising a window, the entry at a chimney, or other unusual place," etc. See also *Franco v. The State*, 42 Texas, 276, for a case where the entry proven was similar in character to that proven in the case at bar, and which was held sufficient by our Supreme Court to support a charge of burglary.

As remarked before, the intent was a matter to be determined by the jury from all the facts and circumstances established in evidence. If defendant had any other purpose or intent than the one charged in the indictment, then we confess that, like the jury, we have been unable to discover it in the record before us. We think the jury were fully warranted in coming to the conclusion of defendant's guilt as alleged.

There being no error in the proceedings or judgment of the court below, the judgment is in all things affirmed.

Affirmed.

FRANK STEPHENSON v. THE STATE.

CONTINUANCE. — Upon complying with the statutory requirements, the applicant is entitled to a first continuance as a matter of right.

APPEAL from the County Court of Hays. Tried below before the Hon. S. FISHER, County Judge.

Hutchinson & Franklin, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The only question we propose to notice in this case is the action of the lower court in overruling

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defendant's application for a continuance. This was the first application made by the defendant for a continuance. It stated all that is required on such applications by article 2987, Paschal's Digest.

The bill of exceptions taken to the refusal of the court to grant the continuance says that the application for continuance was overruled "because it did not state that the defendant knew of no other witness by whom he could prove the same facts, and because it did not exclude the conclusion that there was no other witness whose testimony might have been obtained, by whom the same facts could be proved."

No question was made as to the materiality of the evidence, or that the application did not comply with the requirements in other respects. The application shows that the evidence sought was material; states the name of the witness by whom he could prove the facts alleged by him; that the witness resided in Hays County; that a subpoena had been issued, on his application, and been served on the witness, giving the date of the issuance and of the service of the subpoena, clearly showing sufficient and due diligence. And the further statement is made that the witness was not absent by the procurement or consent of the defendant, and that the application was not made for delay. Nothing further could be required of the party on the first application for a continuance. The statute makes provision for subsequent applications, and adds other requisites which are not required on the first application. *Swofford v. The State*, 3 Texas Ct. App. 76; *Austin v. The State*, 42 Texas, 345; *Shackleford v. The State*, 43 Texas, 138.

The affidavit was a compliance with the law, and the continuance should have been allowed. For this refusal, the judgment is reversed and the cause remanded.

Reversed and remanded.

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JIM MASSIE v. THE STATE.

1. **PERJURY — INDICTMENT.** — Though it is common in practice to recite in an indictment for perjury the substance of the oath, still it is sufficient if the indictment charges that the defendant was “duly sworn,” without describing the attendant ceremonies. If, however, the pleader sets out the oath more minutely than he need, or needlessly describes the manner in which it was administered, such matter cannot generally be considered as surplusage; and if the proof and the averment do not correspond, the proceedings will fail by reason of the variance.
2. **SAME.** — The indictment should charge affirmatively that the testimony given by the defendant and alleged to be false was material to the issue, or its materiality must appear upon the face of the indictment. It is sufficient to charge, generally, that the false oath was material to the trial of the issue on which it was taken.
3. **SAME.** — If the indictment charges, in substance, that the defendant, under the sanction of a judicial oath, responded, with wilful and deliberate falsehood, to certain questions propounded to him in a judicial proceeding before a grand jury, it is sufficient, and it is not necessary that he be charged with having “committed perjury” *in hæc verba*.

APPEAL from the District Court of Harrison. Tried below before the Hon. A. J. BOOTY.

Appellant in this case was convicted at the May term, 1878, of the Harrison County District Court, of having committed perjury by false swearing before the grand jury of that county, and his punishment was assessed at five years' confinement in the State penitentiary.

No statement of facts was sent up, but it appears from the record that the motion to quash the indictment was founded upon the objection that it failed to charge any offence against the laws of this State. The judgment of the court overruling this motion to quash, and its refusal to arrest the judgment, are assigned as error.

The charging part of the indictment is as follows: “That Jim Massie, on the eighth day of May, A. D. 1878, did then and there make his personal appearance before the grand jury in and for the County of Harrison, which was then

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and there in session as the grand jury for the spring term of the District Court of Harrison County, with William M. Johnston as foreman of said grand jury; and the said Jim Massie, having then and there made his personal appearance, as aforesaid, before the said grand jury, did then and there take his corporal oath, and was duly sworn before said grand jury, said oath being then and there duly administered by William M. Johnston, foreman as aforesaid, who was then and there authorized by law to administer said oath, to true answers make to all questions propounded to him by said grand jury, or under its directions; whereupon it then and there became a material inquiry, and necessary for the due administration of the criminal law against gaming in the State of Texas, of the offences against said law committed within the body of said Harrison County, and the said Jim Massie, being so sworn as aforesaid, was asked the following question by said grand jury, viz.: 'Have you (meaning Jim Massie) not, during the present year, A. D. 1878, seen any games with cards played by any persons in a certain cellar under the saloon kept by John Woodward and Louis Hutson, situated in the city of Marshall, in said county of Harrison (said cellar under said saloon being a place commonly resorted to for purposes of gaming, against the peace and dignity of the State of Texas)?' To which said question he, the said Jim Massie, did then and there wilfully and deliberately answer, under his oath, that he had not, during the present year, A. D. 1878, seen any games with cards played by any person in said cellar under the saloon kept by John Woodward and Louis Hutson, situated in the city of Marshall, in said county of Harrison; whereas, in truth and in fact, he, the said Jim Massie, had seen, during the present year, A. D. 1878, several persons, among whom are John Woodward, Louis Hutson, Jack Anderson, and Scott Schine, play games with cards in said cellar under the saloon kept by

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John Woodward and Louis Hutson, situated in the city of Marshall, in said county of Harrison, as he, the said Jim Massie, then and there well knew; that he had seen during the present year, A. D. 1878, a great many persons play games with cards in said cellar under the saloon kept by John Woodward and Louis Hutson, situated in the city of Marshall, in said county of Harrison, among whom were John Woodward, Louis Hutson, Jack Anderson, and Scott Schine; which said answer to said question so asked him, the said Jim Massie, by the grand jury, was wilfully and deliberately false, as he, the said Jim Massie, then and there well knew it to be false; against the peace and dignity of the State of Texas.”

No brief for the appellant has reached the reporters.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was tried and convicted of perjury, and his punishment assessed at five years' confinement in the penitentiary. There is no statement of facts in the record. The only question presented for our consideration in this case arises on the sufficiency of the indictment, and was made by motion to quash and in arrest of judgment.

The alleged perjury is charged to have been committed by the defendant in testimony given by him before the grand jury, at the spring term, 1878, of the District Court of Harrison County.

It is insisted, on the part of the defendant, that the indictment charges no offence against the laws of the State of Texas.

“Perjury is a false statement, either written or verbal, deliberately and wilfully made, relating to something past or present, under the sanction of an oath, or such affirma-

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tion as is by law equivalent to an oath, when such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defence of any private right, or for the ends of public justice." Pasc. Dig., art. 1909.

"The oath or affirmation must be administered in the manner required by law, and by some person duly authorized to administer the same in the matter or cause in which such oath or affirmation is taken." Pasc. Dig., art. 1911.

"All oaths or affirmations legally taken in any stage of any judicial proceeding, civil or criminal, in or out of court, or before a grand jury, are included in the description of this offence." Gen. Laws 1875, p. 170.

We think the indictment charges that defendant was sworn before the grand jury in the manner required by law. It is provided by statute that when witnesses appear before the grand jury, they shall first be sworn by the foreman not to divulge, either by words or signs, any matter about which they may be interrogated, and to keep secret all the proceedings which may be had in their presence, and true answers to make to such questions as may be propounded by the grand jury, or under its directions. Gen. Laws 1875, p. 108.

In the form of an indictment for perjury, by Mr. Archbold, the substance of the oath is given, and this extended oath is quite common in practice in drawing up indictments for perjury. It has, however, been held to be sufficient to allege that the defendant was "duly sworn," without describing the attendant ceremonies; and this decision, says Mr. Bishop, accords with what we have seen to be the true rule in principle. 2 Bishop's Cr. Proc., 912; *Tuttle v. The People*, 36 N. Y. 431; *The People v. Weaver*, 5 Wend. 271.

If, contrary to these rules, the pleader sets out the oath more minutely than he need, or needlessly describes the

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manner in which it was administered, such matter cannot generally be rejected as surplusage; and if proof and averment do not correspond, the proceedings will fail by reason of the variance.

The indictment charges that defendant was "duly sworn," and that the oath was duly administered by William M. Johnston, the foreman of the grand jury, who was then and there authorized to administer said oath to true answers made to all questions propounded to him by said grand jury, or under its directions. Again, if it be insisted that the identical oath taken by the defendant is actually set out in the indictment, then we say, it being the one upon which the false swearing is charged, it is sufficient; and it was not necessary for the pleader to have gone further, and shown in the indictment that defendant was first sworn "not to divulge, either by words or signs, any matter about which he may be interrogated, and to keep secret all proceedings which may be had in his presence."

An indictment for perjury should charge affirmatively that the testimony given by the defendant, and alleged to be false, was material; or it must appear upon the face of the indictment that the matter alleged to be false was material. It is sufficient to charge, generally, that the false oath was material on the trial of the issue on which it was taken. 3 Whart. Cr. Law, sec. 2263; 1 Bishop's Cr. Proc., sec. 915; *Smith v. The State*, 1 Texas Ct. App. 620.

It appears upon the face of the indictment in this case that the false oath was material to the matter under investigation before the grand jury; and, in addition to this, the indictment charges affirmatively that the evidence charged to be false was material. The indictment does not charge *in hæc verba* that the defendant "committed perjury," but it shows what he did swear, and charges that his answer (given under the sanction of an oath, duly administered) to the question asked him in a judicial proceeding before the grand jury was wilfully and deliberately false, as he, the

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defendant, then and there well knew. The indictment alleges facts which, if true, make perjury. We believe that the indictment is a good one.

We find no error in the record, and the judgment of the District Court is, therefore, affirmed.

Affirmed.

SAM JONES v. THE STATE.

1. EVIDENCE. — By the Code of Criminal Procedure, the jury are the exclusive judges of the facts in every criminal case. And, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs a certain degree of weight to be attached to certain species of evidence, the jury are the exclusive judges of the facts proved, and of the weight to be given to the testimony.
2. SAME. — The rule, as laid down by the Supreme Court, and adopted by this court, is that where there is discrepancy or conflict in testimony, it is the province of the jury to reconcile it, if possible; and, if not, to give credence to that which, in their opinion, is best entitled to it.
3. SAME. — Primarily the court below, and afterwards this court, must determine whether or not there has been adduced before the jury a sufficient amount of legal and competent evidence to render it safe to allow the verdict to stand, and become a precedent for the adjudication of offences under the law.

APPEAL from the District Court of Harrison. Tried below before the Hon. A. J. BOOTY.

The case is stated in the opinion.

A. A. Richards and *W. H. Pope*, for the appellant.

George McCormick, Assistant Attorney-General, and *W. B. Dunham*, for the State.

WINKLER, J. The only question of moment presented by the record in this case is as to the sufficiency of the evidence to support the verdict and judgment.

The prosecution rested alone upon the testimony of the

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alleged owner of the hog charged to have been stolen. The defence produced the wife of the defendant, her mother, grandmother, and grandfather, apparently for the purpose of establishing the fact that the hog testified to by the State's witness was not his, but that it belonged to the wife of the defendant. There was such irreconcilable conflict between the statements of the prosecuting witness and those of the defendant's witnesses that they cannot both be supposed to have spoken truly in every particular.

By the Code of Criminal Procedure, "the jury are the exclusive judges of the facts in every criminal case." Art. 593. And, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence, "the jury are the exclusive judges of the facts proved, and of the weight to be given to the testimony." Art. 643 (Pasc. Dig., arts. 3058, 3108).

The rule was announced by the Supreme Court, Willie, J., delivering the opinion of the court, in *Seal v. The State*, 28 Texas, 491, to this effect: "If there was a discrepancy or conflict in their testimony, it was the province of the jury to reconcile it, if possible; and, if not, to give credence to that party who, in their opinion, was best entitled to it. They have chosen to disregard the statements of defendant's witnesses, and give credit to the evidence offered by the State; and as the judge who tried the case below, and who, of course, had every opportunity of seeing the manner of the witnesses at the time of giving their testimony, and of knowing all the other circumstances under which their evidence was taken, did not see proper to set aside the verdict, we see no reason why this court should disturb it." In *Williams v. The State*, 41 Texas, 209, the same doctrine was held, and cited approvingly by this

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court in *Brown v. The State*, 1 Texas Ct. App. 154, and may be regarded as settled law, subject to the isolated exception that a conviction will be set aside, on appeal, when it appears it was not had upon evidence sufficient to support it, as was held in *Tollet v. The State*, 44 Texas, 95, where it was decided, by Roberts, C. J., that the provisions of the Code impose upon the District Court in the first instance, and afterwards upon the Supreme Court, the responsibility of determining whether or not there has been adduced before the jury a sufficient amount of legal and competent evidence as would render it safe to allow the verdict to stand, and become a precedent in the adjudication of offences under the law.

This court received from the Supreme Court the rule laid down in Seal's and Williams's cases, above referred to, as modified in Tollet's case, above, as settled law, and has followed the rule and the modification since the organization of the court; and we have not heretofore seen, nor do we now see, any reason for departing therefrom. *Aycock v. The State*, 2 Texas Ct. App. 381; *King v. The State*, 4 Texas Ct. App. 256. The general rule is, when the evidence on the trial of a criminal case tends to establish different and opposite conclusions, it is for the jury to find their verdict upon the evidence which, in their judgment, is entitled to most credit; and if the judge who tried the case has refused to set aside a verdict of guilty found on such evidence, the conviction will not be disturbed by this court.

No objection has been taken to the indictment or to the charge of the court, and none is perceived. The evidence of the State's witness, which the jury evidently believed in preference to the statements of the defendant's witnesses, was sufficient to support the finding of the jury. The judgment is affirmed.

Affirmed.

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THOMAS ALBERTSON v. THE STATE.

DISORDERLY HOUSE. — The owner of a house is not guilty of an offence under the laws of this State for leasing his house to a tenant, knowing that it is to be kept for the purpose of public prostitution. *Aliter* at common law.

APPEAL from the County Court of Smith. Tried below before the Hon. G. W. SMITH, County Judge.

W. S. Herndon, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant, Thomas Albertson, was convicted in the County Court of Smith County of keeping a disorderly house, for the purpose of public prostitution, and the case is now before us on appeal. Passing over all the other points presented in the record, we will proceed to consider what, on both sides, is conceded to be the main question in the case, and it is this: "Is the owner of a house, who rents it to another with a knowledge that it is to be kept, and which is accordingly kept, for the purpose of public prostitution, guilty as the keeper of such house?"

If the common law was in force, we would have but little difficulty in answering the question. At common law, all disorderly inns, bawdy-houses, gaming-houses, and the like, are public nuisances, and indictable as such. 4 Cooley's Bla. 168.

Mr. Wharton says: "At common law, it is an indictable offence to keep a house of ill-fame for lucre, or to let a house, knowing it is to be used for the purposes of prostitution, though in New York the last point was once ruled differently, and it was laid down that to rent a house to a woman of ill-fame, with the intent that it should be kept for the purposes of public prostitution, is not an offence

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punishable by indictment, though it be so kept afterwards. Perhaps, however, the doctrine held in the latter case was somewhat qualified, as it was declared that when it appeared that the owner of land had either created a nuisance, or continued, or in any wise sanctioned its creation or continuance, he was indictable." Whart. Cr. Law, 2392.

Mr. Bishop, in his commentaries on the criminal law, says: "Probably the true view is, that whenever a man lets a house, knowing the lessee to intend it as a bawdy-house, he is indictable immediately for the criminal attempt, whether the lessee uses the house so or not. If he does so use it, then the lessor may still be holden criminally in the same way, or jointly with the lessee as a keeper of the house, at the election of the prosecuting power." Bishop's Cr. Law, sec. 1041.

In the case of *The People v. John Erwin and Mary Ann Clark*, 4 Denio, 129, the Supreme Court of New York held "that all those who aid or abet the commission of a misdemeanor are principal offenders. Therefore, one who demises a house with the intent that it shall be kept, and which is accordingly kept, for the purposes of public prostitution, and who derives a profit from that mode of using the property, is punishable by indictment for a misdemeanor." In that case Erwin insisted that unless he acted in directing, governing, controlling, or managing the house, he could not be convicted for keeping it.

We make the following extracts from the case: "In misdemeanors there are no accessaries, as there are in felonies; but all the guilty actors, whether present or absent at the time the offence was committed, are principals, and should be indicted as such." And the Supreme Court of Massachusetts, in the case of *The Commonwealth v. Harrington*, 3 Mass. 26, hold the same doctrine. In this case the court say: "There is no statute against such an offence, and the question, then, is, whether it is indictable at common law.

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* * * The real question is, whether exciting, encouraging, and aiding one to commit a misdemeanor is not of itself a misdemeanor. And we find it has been held so to be in the case of *The King v. Phillips*, 6 East, 464, in which it was decided that an endeavor to provoke another to commit the misdemeanor was indictable, it being the object of the law to prevent the commission of offences. On this ground we think the indictment is sustainable. In *Rex v. Scofield* it was held that the intent may make an act, innocent in itself, criminal. To apply this principle to the present case, the letting of a house is in itself an innocent act, but the defendant let his house for the purposes of prostitution, and he knew that it was used accordingly. Now, keeping a bawdy-house was an offence at common law, and letting a house for such a purpose must be a misdemeanor."

At common law, it seems clear that such letting or hiring, with a guilty knowledge, would make the landlord indictable as a principal in keeping the house.

Has the common law been changed in regard to this offence? In the very beginning of the Criminal Code, Part I., under the caption, "Several provisions relating to the whole Code," "Title I," "The general objects of the Code, the principles on which it is founded, and rules for the interpretation of penal laws," we find the following provisions:

"Article 1. The design of enacting this Code is to define in plain language every offence against the laws of this State, and affix to each offence its proper punishment." Pasc. Dig., art. 1603.

"Art. 3. In order that the system of penal laws in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, as a penal offence, unless the same is expressly defined, and the penalty affixed by the written law of this State." Pasc. Dig., art. 1605.

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“ Art. 4. The principles of the common law shall be the rule of construction, when not in conflict with the Penal Code or Code of Criminal Procedure, or with some other written statute of the State.” Pasc. Dig., art. 1605.

“ Art. 9. This Code, and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects; and no person shall be punished for an offence which is not made penal by the plain import of the words of the law.”

The offence for which the appellant is prosecuted is defined in the Penal Code thus :

“ Art. 396. A disorderly house is one kept for the purpose of public prostitution, or as a common resort for prostitutes,” etc. The information is framed under the first clause of the article. Pasc. Dig., art. 2027.

“ Art. 398. Any person who shall keep a disorderly house, as defined above, shall be punished by fine not less than one hundred nor more than five hundred dollars.”

The term “ accomplice,” as defined by article 219 of the Penal Code (Pasc. Dig., art. 1814), is the same as an accessory before the fact at common law; and the Code further provides, by article 1820, Paschal’s Digest, that there may be accomplices to all offences except *manslaughter* and *negligent homicide*.

Whether the evidence set forth in the statement of facts constitutes an indictable offence against the appellant is a question of great consequence to the public. After giving the subject a most mature consideration, it is the opinion of a majority of the court that it does not. The plain import of the language used in the statute forces us to this conclusion. If it had been the intention of the framers of the Penal Code to have made it an indictable offence to rent to another a house for the purpose of public prostitution, how

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easy it would have been for them to have done so, as they did in the chapter of the Code in regard to gaming, where it is provided, in article 420, that "if any person shall rent to another a room or house for the purpose of being used as a place for playing, or dealing, or exhibiting any of the games prohibited by the provisions of this chapter, he shall be fined," etc. Pasc. Dig., art. 2056.

The judgment of the lower court is reversed and the cause dismissed.

Reversed and dismissed.

5	93
757	40
5	93
34	324

EX PARTE D. H. MABRY.

1. **CONSTITUTIONAL LAW—DOG-TAX.**—By the third section of the act of 1876, entitled "An act to levy a tax on the privilege of keeping or harboring dogs, and to provide for the assessment and collection of the same," a failure to pay the tax imposed by the first section is made a misdemeanor. *Held*, that this provision is not in violation of section 85, article 8, of the Constitution of 1876, which declares that no bill shall contain more than one subject, which shall be expressed in its title, and that if any subject embraced in an act be not expressed in its title, the act shall be void *pro tanto*.
2. **SAME.**—The said act embraces but one subject, and the provisions of its third section are subsidiary to that subject, and are embraced in the title of the act.
3. **TITLE OF ACTS.**—It is settled in this State that the provisions of the Constitution in regard to the titles of legislative acts are mandatory, and not merely directory; but in the application of them a liberal construction obtains, with the view of sustaining the validity of legislative enactments.
4. **CONSTITUTIONAL LAW.**—The Federal government being one of enumerated powers, the constitutionality of an act of Congress is to be tested by the *grant* of powers contained in the Federal Constitution; but the State governments are presumed to be invested with general power of legislation, and, therefore, in determining whether an act of a State Legislature is in violation of its Constitution, the inquiry is directed to the *limitations* imposed on the Legislature by the terms of the Constitution. See the opinion *in extenso* on this subject.
5. **HABEAS CORPUS.**—The writ of *habeas corpus* is not available to effect the purposes of an appeal, *certiorari*, or *supersedeas*.

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APPEAL from the County Court of Ellis. Tried below before the Hon. J. D. TEMPLETON, County Judge.

E. P. Anderson, and *Hancock, West & North*, for relator, insist that section 3 of the act of 1876 (p. 198, ch. 117) is obnoxious to section 35 of article 3 of our Constitution, and is void, as it contains a different subject-matter, provides a different remedy, and has a different end and object than the balance of the act, citing sections 1, 2, 3, of the act. See Pasc. Dig., 67, sec. 24, note 199; *Cannon v. Hemphill*, 7 Texas, 208; *San Antonio v. Gould*, 34 Texas, 49; *Giddings v. San Antonio*, 47 Texas, 548; Pasc. Dig., art. 2400; *The State v. Stadle*, 41 Texas, 404; *Bell v. The State*, 42 Texas, 306; *The State v. McCracken*, 42 Texas, 386; *Gaston v. McKnight*, 43 Texas, 624; Cooley's Const. Lim, 2d ed., 81, 82, 130, 131, 141-150.

Said act is void because it is vague and uncertain, and does not give any court jurisdiction; especially does it not give it to a justice of the peace, as the penalty may be over \$200. See Const. 38, art. 5, sec. 19; Pasc. Dig., arts. 2271, 2345; 1 Bishop's Cr. Law, 51, 54, 55. Said section 3, while it provides for arrest and imprisonment, does not merge the tax into the fine, but still leaves it due, and is nothing more nor less than imprisonment for debt. Const. 6, art. 18.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The appellant, having been arrested by the sheriff on a warrant issued by a justice of the peace, which required him to answer the State "on a charge of unlawfully failing to pay, on or before the first day of January, 1878, the tax assessed against him for keeping, owning, and harboring *one certain dog*, in said county, for the year 1877," sued out a writ of *habeas corpus* before the county judge.

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In his petition the applicant avers that the *capias* or warrant under which the arrest was effected is void, and of no effect, "because the offence for which he is alleged to be arrested, and so restrained of his liberty, is not known of to the laws of Texas, are unconstitutional and void; and, furthermore, that if there was such offence as the one mentioned in said *capias* known to the laws of the State, that said N. G. Davis has no jurisdiction of the same, and his acts are void."

The sheriff answered, admitting that he held the applicant in custody, and pleaded the warrant of arrest in justification of his acts. On a hearing, the county judge refused to release the prisoner, and remanded him back into the custody of the sheriff; and from the action of the county judge this appeal is taken.

The judgment recites that the two principal objections of the relator to his arrest are, first, as to the constitutionality of the act under which the *capias* was issued; and, second, as to the jurisdiction of the justice of the peace who issued the *capias*. Counsel for the appellant, in their brief, say that the grounds upon which they rely in order to defeat the arrest are, first, that the third section of the act of 1876 is in violation of section 35, article 3, of the Constitution; and, second, that this third section is vague and uncertain, and does not give any court jurisdiction; especially does it not give it to a justice of the peace, as the penalty *may* be over \$200.

The section of the Constitution it is claimed the act under consideration is in violation of declares that (except general appropriation bills, which may embrace various subjects and accounts for and on account of which moneys are appropriated) "no bill * * * shall contain more than one subject, which shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

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The title of the act is in this language: "An act to levy a tax on the privilege of keeping or harboring dogs, and to provide for the assessment and collection of the same." The third section of the act is as follows: "That if any person shall keep a dog that has been assessed for taxes under the act, and shall fail to pay the tax on the same on or before the first day of January next after said assessment is made, he or she shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be fined not less than five dollars and costs for each dog so kept. And it is hereby made the duty of county attorneys to prosecute, upon their own motion, all delinquent tax-payers under this act."

In *Ex parte Cooper*, 3 Texas Ct. App. 489, this court held that the act under consideration was not obnoxious to the provisions of the Constitution; that, under the general police power of the State, the Legislature had authority to impose upon persons owning or harboring dogs a tax for the privilege, and to apply the revenue arising therefrom to the maintenance of the public schools of the county.

It is, therefore, to the precise questions raised below and insisted upon in argument here that we propose briefly to devote attention, to wit: First, is the third section of the act, as copied above, contrary to the section of the Constitution above quoted? In other words, does this section contain a different subject from that embraced in the *title* of the act? And, secondly, had the justice of the peace jurisdiction?

The first and most material inquiry is to determine what is the subject embraced in the title of the act.

Many adjudications have been made by the courts of last resort in Texas, under provisions of former constitutions having provisions similar to that of the present Constitution. Most of them arose under that of 1869, it being therein declared: "Every law enacted by the Legislature

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shall embrace but one object, and that shall be expressed in the title.” Gen. Prov., sec. 17. It will be noticed that, whilst the Constitution of 1869 prohibits the enactment of laws embracing more than one *object*, the present Constitution prohibits the enactment of laws embracing more than one *subject*. It will be sufficient for our present purpose to treat the two words as being equivalent to each other, and hence not necessary to inquire whether it was the intention or effect to enlarge or restrict the legislative grant by the employment of the word *subject* instead of the word *object*.

It is well settled that an act may be constitutional in part and unconstitutional in part; and this is plainly indicated in the latter portion of the article above set out, to the effect that “if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.” So that the general tenor and scope of the act in question may be not obnoxious to constitutional objection, yet if this third section is found to embrace a subject not expressed in the title of this act, that section must be held void on the ground that the subject of the section was not so expressed. Cooley’s Const. Lim. 177.

In the investigation of authorities on these subjects, the distinction recognized by courts and elementary writers in regard to the constitutional powers of the United States and the like powers of the States is: The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look to the national Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case; and this presumption is a conclusive one unless, in the Constitution of the United States or of the State, we are able to discover that it is prohibited. We

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look in the Constitution of the United States for *grants* of legislative power, but in the Constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the State was invested in its creation. Cooley's Const. Lim. 173. It has been said that, in deciding upon the constitutionality of a law, a statute will not be declared void unless the nullity and invalidity of the act are placed, in the judgment of the court, beyond a reasonable doubt. Id. 182; *Embry v. Connor*, 3 N. Y. 518. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained. See a number of cases in note 3 to page 182, above cited from Cooley.

“The constitutionality of a law, then, is to be presumed because the Legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so.” Id. 183. And, “as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, when the meaning of the Constitution is clear, *that the court, if possible, must give the statute such a construction as will enable it to have effect.*” Id. 184. “Whenever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.” *Newland v. March*, 29 Ill. 384.

Now, while similar provisions have been held in some States to be directory, yet in Texas the provision against inserting in an act something not expressed in the title has been held to be mandatory, since the case of *Cannon v. Hemphill*, 7 Texas, 208. Still, in application to statutes, the construction has been a liberal one. In *Giddings v. San Antonio*, 47 Texas, 548, Roberts, C. J., after discussing at length the rule of construction and its origin,

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and citing the rule of construction as laid down in *Cannon v. Hemphill*, says: "While this has been regarded as the general rule of construction here, in its application the most liberal construction has been given by the Supreme Court of this State, in accordance with the general current of authority, to make the whole law constitutional when the part objected to as infringing the provisions of the Constitution would be considered as appropriately connected with, or subsidiary to, the main object of the act as expressed in the title, which may be seen by reference to a number of cases, which have been decided *pro* and *con*, involving the question;" citing a number of cases, and among them those relied on by the appellant's counsel to support a contrary view.

We make the following extract from the opinion of the court in *Davey v. Galveston County*, 45 Texas, 291, delivered by the present chief justice:

"It is also insisted that the act is unconstitutional because it embraces two objects, both of which are embraced in the title. The number of cases in which the court has been called upon to consider similar objections to other laws renders it necessary to say but little more than that this objection cannot be maintained. The act embraces, as we think, but one leading object. All its provisions are subsidiary to, and legitimately connected with, and tend to effect and enforce this main object, which is sufficiently, clearly, and definitely expressed in the title." See the case, and the statement of it by the reporter, and briefs, for the origin of the question adjudicated.

Upon these authorities, which afford a correct rule of interpretation for the solution of the main question, we are of opinion that the act under consideration embraces but one leading subject, which is expressed in the title, and that all of its provisions are subsidiary to, and legitimately connected with, and tend to effect and enforce the main object

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embraced in the title of the act; and that all the different sections may be construed to be in harmony with the main *subject* expressed in the title, including the enforcement of a compliance by the penal sanctions provided in the third section for its enforcement against those who disregard its provisions, the leading object of the law being to tax the privilege of keeping or harboring dogs, and to provide for an assessment and collection thereof.

It is insisted, however, on behalf of the appellant, that the justice of the peace did not have jurisdiction of the subject-matter involved in the arrest, for the reason that under the act a fine might be imposed which would exceed his jurisdiction. The act makes the violation of it a *misdemeanor*, and affixes the penalty for its violation at a fine of not less than \$5, but fails to state the maximum. Now, if a trial had taken place, and a fine had been imposed by the justice, the conviction might be set aside on an appeal from the judgment, though not by the proceeding by *habeas corpus*, upon the settled rule that the writ of *habeas corpus* cannot be used in order to effect either an appeal, writ of error, or *certiorari*. *Ex parte Schwartz*, 2 Texas Ct. App. 74, and authorities there cited.

Prima facie, the justice of the peace had authority under the law to issue the warrant for the arrest of the relator, there being nothing in the record to show an act without jurisdiction, and the accusation being a misdemeanor. No mention is made of the subject of the bail to which the applicant would be entitled.

Believing that there was no error in the action of the county judge in refusing to discharge the applicant, the judgment is affirmed.

Affirmed.

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HELEN BIGBY v. THE STATE.

1. **INDICTMENT.** — It is sufficient if the indictment pursues the language of the statute, if by so doing the act in the commission of which the offence consists is fully, directly, and expressly alleged, without uncertainty or ambiguity.
2. **EVIDENCE.** — If the guilt of a defendant indicted for a misdemeanor is made out by proper evidence, in such a way as to leave no doubt in the mind of a reasonable man, a judgment of conviction will not be set aside because immaterial evidence was received.
3. **CHARGE OF THE COURT.** — While the failure of the court, in a trial for keeping a disorderly house, to define the meaning of the word “prostitution,” in the charge to the jury, is not fatal to the judgment, still it were best had such definition been given.

APPEAL from the County Court of Smith. Tried below before the Hon. G. W. SMITH, County Judge.

The opinion sufficiently states the case.

Reaves, Dodd & Reaves, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. An information was filed in the County Court of Smith County, at its February term, 1878, against appellant, Helen Bigby, and one Thomas Albertson, jointly, charging them with the offence of keeping a disorderly house for the purpose of public prostitution. Defendants were granted a severance on the trial.

By article 396 of the Penal Code, “a disorderly house is one kept for the purpose of public prostitution, or as a common resort for prostitutes,” etc. The information in this case is framed under the first paragraph of this article. It sufficiently defines the offence, and sets it forth substantially in the words of the above article. We are of opinion that this is a case in which an information so framed is suf-

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ficient, because no allegation of anything more than these words import is necessary to show that defendant has committed the statutory offence. According to the rules of pleading, it is sufficient in an indictment to pursue the very words of the statute, if by so doing the act in the doing of which the offence consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity. The motion in arrest of judgment was properly overruled.

We find no error in the charge of the court. The court did not err in refusing to give the instructions asked by the defendant. A part of them were substantially embraced in the charge given, and this the court was not required to repeat. And the others were either not the law, or were not applicable to the case made by the evidence.

It, perhaps, would have been better for the court to have instructed the jury as to the meaning of the word "prostitution." A failure to do this is not fatal, we think, to the judgment, as the meaning of the word in the connection used is so well understood in its usual acceptance in common language.

The court may have erred in admitting the testimony of Hockersmith, Hunt, and others, as to the financial standing and visible means of support of the appellant; still, we cannot say that the judgment should be reversed for the admission of this evidence. In criminal cases, courts will rarely presume that the particular evidence which had been wrongfully admitted could have had no influence on the deliberations of the jury. Whart. Cr. Law, 7th rev. ed., sec. 3258.

In the case of *McWilliams v. The State*, 44 Texas, 116, the court held that the admission of illegal evidence of an important fact, material and pertinent to the issue, and which is additional to other facts legally in evidence, is erroneous, and a conviction will not be permitted to stand, however certain it may be that the jury would have found a

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verdict of guilty upon other sufficient evidence adduced on the trial.

We believe, however, in a case of misdemeanor, if the prisoner's guilt be clearly made out by proper evidence, in such a way as to leave no doubt in the mind of a reasonable man, his conviction ought not to be set aside because some other immaterial evidence was received which ought not to have been. See *The State v. Ford*, 3 Strobb. 517; 2 Russ. on Cr. 539.

This case was clearly made out by proper evidence. We deem it unnecessary to notice *seriatim* all the points raised in the record, and deem it only necessary to say, further, that we find nothing in the case that requires a reversal of the judgment. It is, therefore, affirmed.

Affirmed.

EX PARTE R. J. AND W. B. MOORE.

1. **HABEAS CORPUS** — PRACTICE IN THIS COURT. — Although the adjudication of facts by the court *a quo* is not binding on this court in any state of case, yet, in cases of conflicting testimony, the judge of that court stood in a much better situation than this court can, to determine correctly the comparative credibility of the witnesses; and, therefore, great deference is usually to be accorded to the construction he has placed upon the testimony.
2. **SAME.** — This court maintains its practice of abstaining from comment upon the evidence in *habeas corpus* cases.

HABEAS CORPUS, on appeal from a judgment in chambers, rendered by the Hon. L. W. MOORE, judge of the Fifteenth Judicial District.

I. G. Killough, a citizen of Fayette County, held in the highest esteem for his personal integrity, his public spirit and usefulness, his private charities, and an intrepidity of soul often tested, but never shaken, in the military service of

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Texas, came to a sudden and sanguinary death on October 2, 1878. He resided in the town of La Grange, and in the afternoon of the day of his death was returning home from his farm, a few miles in the country, accompanied in his buggy by his wife and their little four-year-old boy, when he was fired upon and instantly killed.

The appellants in this case were arrested and held in custody on the charge of the murder of Capt. Killough. One of them, Robert J. Moore, is the brother of Mrs. Killough; the other, William B. Moore, is her nephew. John D. Hunt, principally inculpated by the testimony, but not arrested, is her brother-in-law.

The testimony of more than forty witnesses was adduced, much of which relates to localities, motives, and incidents of a circumstantial bearing upon the case, and the whole of which constitutes quite a voluminous record. A synopsis is deemed sufficient for the purposes of this report.

Mrs. T. B. Killough, wife of the deceased, testifying for the State, says in substance that on the day of the killing, her husband, herself, and their child were returning to La Grange from the farm of the deceased, in a buggy, and that they were intercepted between Phillips's house and Jordan's Creek by the appellants and one John D. Hunt; that Hunt levelled his shot-gun and shot the deceased, who fell out of the buggy over witness and their little boy, both of whom fell out with deceased, the child falling under the body of its father. The witness pulled the child from under the body of its father, and ran up and down the road to see if she could see any one passing, to whom she could appeal for help. She saw no one. There was not a living being to witness the murder except herself, child, and the two Moores. The Moores and Hunt came out of the woods from the right, across the road, abreast, and all in the same position. The Moores stopped their horses in front of the buggy, some fifteen or twenty feet distant, with the horses'

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heads turned a little across the road. When the Moores stopped in the road, Hunt drew his gun. After firing, Hunt rode around the buggy and stopped near the body of the deceased, and asked witness, "What did you let him do that for?" Witness replied, "Do what, you assassin?" to which Hunt replied, "Try to kill me; did you not see him?" Witness answered, "You assassin! you know he did not try to shoot you!" Hunt then rode off toward Ledbetter. Deceased was driving the buggy, and was killed without a word having passed. He had no weapon of any kind, either about his person or about the buggy. After Hunt left, Bob Moore pulled out a derringer, shot it off, and threw it down by deceased's back. Witness picked it up, and Bob Moore remarked, "That is what he tried to shoot Hunt with." Witness replied that her husband had told her he (accused) could do that, and now "you are doing that very thing, and I am here seeing you do it." Deceased's friends had previously disarmed him, and he had no pistol. Deceased never owned a pistol like the one thrown down by his body, to witness's knowledge. After some time had elapsed, one Jones drove up in a wagon. Witness asked Jones to stay with the deceased's body until she could go for friends. Jones declined, saying he was in the employ of Col. John H. Moore, and could not stay. Witness then asked her brother and nephew if they would stay, the nephew declining and the brother agreeing to do what he could for her, but witness declined receiving anything at his hands. Bob Moore took Jones off and talked to him, and was talking to him when witness went on to town. The two Moores each had a double-barrelled shotgun in hand during the whole of these occurrences. Bob Moore is witness's brother, W. B. Moore her nephew, and Hunt her brother-in-law. Witness and her husband were travelling an unusual road for them, to avoid meeting Hunt, under advice of friends.

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James Kenley, sworn, says that himself and W. B. Moore work at Col. Moore's gin, and that on the day of the killing Bob Moore and Hunt rode up to the gin. In a few minutes Bob and W. B. Moore and Hunt rode off together, each carrying a double-barrelled shot-gun; and after a sufficient length of time to have ridden five miles, W. B. Moore came back, riding his horse in a run, and said to witness that the "son of a b—h had quit whipping the Moores and Hunts;" and on witness asking his meaning he said, "Uncle John Hunt has killed Killough." W. B. Moore did not have the gun on his return, but had a six-shooter. Witness went to the body, and found many others there. It was lying in the road. Major Dunn and witness examined deceased's pockets and found no weapons of any kind, except a pocket-knife. About one hour had elapsed from the departure of the two Moores and Hunt up to the return of W. B. Moore. Witness found the body of deceased lying about three-fourths of a mile from the gin. Never heard that Byrd Moore had made arrangements to go hunting.

The testimony of C. Amberg is, substantially, that Hunt came to his store, in Ruttersville, on the Monday preceding the murder, and bought 25 cents' worth of percussion caps and buckshot. Hunt stated to witness that he had had a difficulty with the deceased in La Grange, in which deceased used a cane on him, and that he didn't know how he could stand it. Hunt had a double-barrelled shot-gun with him at the time.

Max Scheich testified, in effect, that he is a blacksmith in Ruttersville; that Bob Moore came to his shop on Monday, before the killing, and got him to take the tubes out of his shot-gun and make an examination. Hunt came up after Moore, and the two left together.

Two witnesses relate, in substance, that after the difficulty between deceased and Hunt in La Grange, witnesses and one other, attempting to settle the difficulty, went, with

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deceased's permission, to Hunt's house, and submitted an agreement signed by deceased, pledging himself to refrain from hostile demonstrations on Hunt, provided Hunt made none on him. This was submitted, after stating to Hunt that deceased had said that if Hunt had not intended to insult him, he, deceased, was sorry he had struck him, and begged his pardon. This was rejected as a basis of settlement. Witnesses then proposed that each party, deceased and Hunt, should select three friends each, and abide by whatever agreement they should make. Hunt submitted this proposition to R. J. Moore, and it was finally declined, with the remark that deceased had broken two previous pledges, and would break a third. It was finally agreed that the parties should pass and repass without molesting each other for one week, and the deceased was to go unarmed. This was on Monday preceding the Wednesday of the killing. It appears from this testimony that there had been a previous difficulty between deceased and William Moore, the father of W. B. Moore and brother of R. J. Moore, in regard to which an armistice was now operating. W. B. Moore was not known to witnesses in any of these transactions.

Mrs. Elizabeth Moore, wife of R. J. Moore, for the defence, testified, in substance, that on Wednesday, the day of the killing, Hunt took dinner with herself, husband, and other members of the family, at Col. J. H. Moore's, preparatory to going hunting that evening with her husband; that she prepared food to do them that night and next morning; that they left the house, starting, according to their own statements, to the old farm of Col. J. H. Moore, some ten miles distant; that they both carried shot-guns, and said they were going by the gin, after W. B. Moore. Witness did not see W. B. Moore that day until after the killing.

W. R. Wallace, for the defence, describes the pistol iden-

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tified as the one Mrs. Killough picked up by the side of deceased, and discovers the initials "I. G. K." on it.

James Jones, for the defence, testified, in substance, that he lived on a place of Col. Moore's, and was on his return from La Grange to his home, near the gin, on the day of the killing; he was passed by the two Moores and Hunt; that about seventy-five yards in front of him, the three parties alluded to met the buggy containing the deceased and his wife and child, the two Moores passing to the right and Hunt to the left of the buggy; that as the parties got abreast, — none of them halting, — he saw the deceased extend his right arm towards Hunt, and saw Hunt level his shot-gun at deceased, and heard two reports, one louder than the other. Witness heard the weaker report first. Deceased fell out on the left side of the buggy instantly, his wife and child falling with him; heard no other report of fire-arms, though he remained on the ground until after the Moores, Hunt, and the wife of the deceased had left; had no private conversation with either of the Moores on the ground at or near the place of killing; is a tenant of Col. J. H. Moore, father of one and uncle of the other defendant.

William Phillips testified, in substance, that he was at work in a cotton-patch near where deceased was killed; heard two reports of fire-arms in the direction of where the body lay, one louder than the other, and about two seconds apart; heard the weaker report first, and heard no other report after the louder one of the two already mentioned.

The testimony of Mrs. Mary E. Phillips and J. W. Phillips is substantially the same.

The presiding judge refused bail for the applicants, and remanded them to custody, to await the action of the grand jury; and from this they took the present appeal.

Timmons & Brown, Teichmuller & Dunn, and W. H. Led-

Argument for the appellants.

better, for the appellants, citing Paschal's Digest, arts. 3221, 3222, urge that from the plain requirement of the statute it follows that this court, in its decision on appeals in *habeas corpus* cases, is not bound by the general rule that the finding of facts by the trial court will not be revised unless clearly wrong; but, on the contrary, it is the duty of this court to examine the facts and apply to them the law, just as if the trial here were an original one. See *Ex parte Miller*, 41 Texas 213, and cases there cited; *Ex parte Rothschild*, 2 Texas Ct. App. 560.

Section 11 of the Bill of Rights of the State Constitution, provides as follows, viz. :

“All prisoners shall beailable by sufficient sureties, unless for capital offences when the proof is evident.”

From this clause, it follows that the applicants in this case are entitled to bail, unless it is evident that they are guilty of murder in the first degree.

In determining whether or not it is evident that they are guilty of murder in the first degree, we must first see what is the meaning of the terms “evident” and “proof is evident.”

The Constitution of 1845 provides: “All prisoners shall beailable upon sufficient sureties, except in capital cases when the proof is evident or presumption great.”

The meaning of this section, which we find in all the Constitutions of the several States of the Union, is explicitly defined in the case of *McCoy v. The State*, 25 Texas, 38. In that case the court say: “The terms ‘proof is evident or presumption great’ are as evident to the legal mind as any words of explanation could make them, and are intended to indicate the same degree of certainty whether the testimony be direct or circumstantial. The design is to secure the right of bail in all cases, except in those in which the facts might show with reasonable certainty that the prisoner is guilty of a capital offence.”

Argument for the appellants.

The same clause in our present Constitution (above cited) has never received judicial interpretation, and hence the inquiries arise :

I. What is the effect of the change?

1. The terms “proof is evident” and “presumption great” have each a distinct meaning.

2. The first of these terms indicates a far greater degree of certainty than the second.

3. In the practical application of these terms to any given case, the words “or presumption great,” requiring an inferior degree of certainty, exercise controlling power and virtually supersede the effect of the preceding words, “the proof is evident,” and render them superfluous.

For, if the section of the Constitution under consideration had been changed as follows: “All prisoners shall be entitled to bail, except in capital cases when the presumption of guilt is great,” it would not have affected the right to bail of persons accused of capital offences.

4. By the elimination of the term “or presumption great” from the Constitution, its framers manifestly intended to secure the recognition of the right to bail of persons accused of capital offences, by announcing it in plain and unmistakable language.

II. What is the meaning of the terms “evident” and “proof is evident?”

1. While presumption, or inference from one or more known facts to the one fact sought to be established, is only resorted to in the absence of proof, proof, as the result of evidence, is certain, and leaves no room for presumption.

2. Concerning the term “evident,” we invite the attention of the court to the following definitions :

Worcester’s Dictionary : “*Evident* — clear to the mind, obvious, plain, apparent, manifest, notorious, palpable — as, it is evident that man is mortal.”

Crabb on Synonyms, pp. 84 and 85 : “What is evident

Argument for the appellants.

is seen forcibly, and leaves no hesitation on the mind ; it is opposed to that which is dubious. * * * A proof is evident ; it requires no discussion ; there is nothing in it that clashes or contradicts. The guilt or innocence of a person is evident when everything serves to strengthen the conclusion."

Keeping, then, in mind the meaning of the term " proof is evident," we may safely say, from the facts of the case,—

(1) That it is evident that Hunt took the life of Killough.

(2) That it is not evident that, in doing so, he was guilty of murder in the first degree. And why not evident? Because, first, the testimony of Mrs. Killough, upon which the prosecution wholly rely to prove the facts denounced by the law as murder in the first degree, is, in all its material points, contradicted by the witness Jones, an eye-witness to the killing, and whose testimony shows that Hunt acted in self-defence. Because, second, her testimony is contradicted by not only the witness Jones, but by all the witnesses for the prosecution and defence who heard the reports of fire-arms at the time of the killing. Because, third, her testimony is contradicted by the condition of the shirt worn by the deceased at the time of the killing. Because, fourth, the initials, " I. G. K.," of the deceased, I. G. Killough, are upon the pistol picked up by Mrs. Killough on the ground.

If, then, it is not evident from the testimony in this record that Hunt is guilty of a capital offence, it follows necessarily that the applicants are not, and should be admitted to bail.

But, suppose it should be the conclusion from the proof that Hunt is guilty of murder in the first degree, it by no means follows that the applicants are, and that they should be refused bail. For in that view of the case they could only be guilty, as Hunt would be, of murder in the first degree, when, from the proof, it could be said that it is evident,—

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(1) That they were acting as principals with Hunt in the perpetration of the act ; or that

(2) They were personally present, knowing Hunt's unlawful intent, and aided and encouraged him in the perpetration of the crime, by words or gestures ; or

(3) That, at the time of the commission of the act by Hunt, they endeavored in some way to secure his safety or concealment. Pasc. Dig., arts. 1809-1811.

There is no testimony in the record which brings the applicants within the purview of either one of the foregoing definitions. There is no certainty, beyond a reasonable doubt, such as would control the minds of a jury in a final trial ; far less can the proof be regarded as evident, so as to deprive these applicants of bail.

We respectfully submit that the judgment should be reversed, and the applicants admitted to bail.

George McCormick, Assistant Attorney-General ; *R. H. Phelps*, County Attorney ; *Seth Shepard*, and *Duncan & Andrews*, for the State.

WHITE, J. In view of the conclusion arrived at in this case, following the uniform practice now so well established, we might simply content ourselves with an announcement of the result, without further comment or remark. Justice to ourselves, and to the gravity and importance of the question involved, would, however, seem to require the further statement that we have not only listened to and pondered well the truly able arguments of counsel representing the applicants and the State, but have read with deepest attention and care each syllable and word contained in the voluminous record before us.

The interest naturally created by a recital and perusal of the facts given in evidence in the trial court has been greatly heightened by the superior skill and marked ability with which they have been handled in the learned discussion of

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the nice and subtle questions of constitutional law, and the rules of evidence applicable to and involved in them. Our endeavor has been so to consider, with deliberation, each fact and circumstance in the light of known and established principles that we could, if possible, arrive at a fair, just, legal, and satisfactory deduction from the whole.

It was said in *Drury v. The State*, 25 Texas, 45, — and, we think, correctly, — that being also an appeal on *habeas corpus*: “As to the credibility of the witnesses, in case of conflict or apparent contradiction, we think the judge below in far better situation to determine than this court; and therefore, generally, great deference must be paid to the construction placed upon it by him in the judgment he has pronounced.” Still, we do not wish to be understood as meaning that the judgment of the court below would be binding upon us, even in its adjudication upon the facts, in any state of case where we might be impressed with reasonable doubts, or could not willingly concur in its correctness. So much in vindication of the action of this court, in its method of adjudicating the questions in this case.

The result of our mature deliberations is, that the district judge did not err in refusing to admit the applicants, R. J. and W. B. Moore, to bail; and, so believing, the judgment below is in all things affirmed.

Affirmed.

J. F. BARNELL v. THE STATE.

1. EVIDENCE. — That a conviction may be sustained, it must not only appear that the offence charged has been committed, but the evidence must show to a certainty, beyond strong probability or suspicion, that the person charged committed or participated in the commission of the offence.
2. SAME. — The responsibility of determining whether or not there has been adduced before the jury a sufficient amount of legal and competent testimony to render it safe to establish a precedent for the adjudication of

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offences, under the law, is placed by the Code primarily on the District, and finally on this court. This duty of the court is the exercise of legal judgment as to what facts are sufficient to rebut the legal presumption of the innocence of the accused.

3. *SAME*. — The rule is, that the *best* existing evidence must be produced or accounted for. Note facts illustrative of this rule.

APPEAL from the District Court of Robertson. Tried below before the Hon. S. FORD.

The facts are stated in the opinion of the court.

J. W. McNutt, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The following is the entire testimony adduced on the trial of the appellant:

D. L. Dotson, a witness for the State, testified that he lost a gray gelding, on or about December 20, 1877; that he had tied his horse in front of Bishop's house, in Hearne; that the horse was branded A, and was taken without his consent, and was taken in Robertson County, and State of Texas; and that he tracked the horse about a half-mile in the direction of Milam County, Texas, and got the horse back from A. A. Burke, at Rockdale, in Milam County, Texas, two or three days after the taking.

A. A. Burke, witness for the State, said that he saw the defendant in Rockdale some time between the 20th and the 25th days of December, 1877; that the defendant had been arrested, and was in the hands of a deputy United States marshal; that, while in custody, defendant gave witness and said United States marshal an order on a livery-stable keeper at Cameron, in Milam County, Texas, for a gray gelding, which was afterwards claimed by D. L. Dotson, and was by him turned over to D. L. Dotson; and that the defendant gave the order to him and the United States

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deputy-marshal for the horse in order to turn the horse over to an attorney to defend him in another case.

In *Tollet v. The State*, 44 Texas, 95, two rules were laid down by the Supreme Court of this State, which have been followed by this court, and deemed correct, and applicable to and decisive of the present case.

1. To sustain a conviction it should appear, not only that an offence as charged has been committed, but there should also be proof tending to establish that the party charged was the person who committed it, or was a participant in its commission, to a degree of certainty greater than a mere probability or strong suspicion. There must be legal and competent evidence pertinently identifying the defendant with the transaction constituting the offence charged against him.

2. The provisions of the Code "impose upon the District Court in the first instance, and afterwards on this court, the responsibility of determining whether or not there has been adduced before the jury a sufficient amount of legal and competent evidence as would render it safe to allow the verdict to stand and become a precedent in the adjudication of offences under the law. The performance of this duty on the part of the court is the exercise of a legal discretion and judgment as to what facts should be sufficient to rebut the legal presumption of innocence to which every one is entitled who is put upon his trial for an offence."

It is conceded that the fact in evidence that the accused gave the witness an order to a stable-keeper in Cameron for a gray gelding, which was afterwards turned over to Dotson, the owner, was a circumstance which tended, at least, to show that he had knowledge of the theft; yet this testimony would have been more satisfactory if it had been shown that the witness had obtained the gelding at the livery-stable indicated in the order, or elsewhere, on information obtained

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from the accused ; or by having produced the testimony of the stable-keeper, which testimony was certainly accessible to the State ; or, at any rate, its absence is not accounted for.

The evidence adduced indicates that there was better, or at least more conclusive, evidence within the reach of the prosecution. If it be the fact that the giving of the order, or any statement made by the accused, led to the discovery of the animal, or that it was really found at the place mentioned in the order, this could have been shown on the trial ; or if he had conveyed the horse to Cameron, or some other person acting with him had done so, it is most likely this could have been shown. When the testimony discloses the existence of better evidence, — that is, more original sources of information, — the law requires its production. 1 Greenl. on Ev., sec. 82 ; *Porter v. The State*, 1 Texas Ct. App. 394 ; 2 Abb. Dig. 327, 328.

We are of opinion that the evidence of the guilt of the appellant is not of that satisfactory character as would render it a safe precedent in the determination of criminal cases under the law.

The judgment is reversed and the case is remanded.

Reversed and remanded.

LON WILLIAMS v. THE STATE.

INDICTMENT. — The indictment charges the theft of “fifty silver half-dollar pieces, of the value of fifty cents each, the same being corporeal personal property, and altogether of the value of twenty-five dollars, and the property, of one G. B.” *Held*, insufficient, in that the indictment does not show that the money was the current coin of the United States, or any other government. There is no question in pleading better settled than that the thing stolen must be correctly described, for the purpose of identification ; and when coin is charged as the thing stolen, the kind of coin must be specified, when it can be done, by the grand jury ; and when it cannot, it is proper that the indictment show this fact.

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APPEAL from the District Court of Rusk. Tried below before the Hon. A. J. BOOTY.

Jones & Wynne, for the appellant.

W. B. Dunham, for the State.

ECTOR, P. J. The appellant in this case was indicted for the theft of “fifty silver half-dollar pieces, each piece of the value of fifty cents, the same being corporeal personal property, and altogether of the value of twenty-five dollars, and the property of one George Baker,”—without stating that the money was the current silver coin of the United States of America, or of any other government, and without giving any further description of the same.

The indictment, we believe, is defective because the description of the property alleged to have been stolen is not sufficient. When gold or silver coin has been stolen, there should be such a description of the money as to call to mind the particular coins, so as to identify the thing stolen; and when it cannot be done by the grand jury, the indictment should state this fact.

After a careful examination of the cases we have been able to find which have been decided by courts of last resort, both in England and America, we have been forced to the conclusion that the defendant’s motion in arrest of judgment should have been granted by the District Court, because the indictment does not give a sufficient description of the property alleged to have been stolen, nor show any reason why such description was impracticable. There is no question better settled in pleading than that the thing stolen must be correctly described, for the purpose of identification, and when a party has been indicted for the theft of either gold or silver coin, the kind of coin must be specified, when this can be done, by the grand jury; and when it cannot be done, it is proper that the indictment should show that fact.

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Mr. Wharton says: "Money is described as so many pieces of gold and silver coin of the realm, called _____. The pieces of the coin must be specified." 1 Whart. Cr. Law, sec. 363. Mr. Bishop and Mr. Chitty recognize the same strictness in pleading when a defendant is charged with the theft of money. 2 Bishop's Cr. Proc., secs. 703, 704; 2 Chitty's Cr. Law, 947, 960. See also *The State v. Longbottom*, 11 Humph. 39; *The Commonwealth v. O'Connell*, 12 Allen, 183; *The People v. Ball*, 14 Cal. 101; *The People v. Cohen*, 8 Cal. 42.

In the case of *The State v. Longbottom* the Supreme Court of Tennessee say: "When personal chattels are the subject of an offence, as in larceny, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated. 2 Hale's P. C. 182, 183; Arch. Cr. Pl. 49, London ed. Money should be described as so many pieces of the current gold or silver coin of the realm. And the species of coin must be stated by the appropriate name."

In this respect the indictment in the case at bar was clearly defective, and the motion in arrest of judgment should have been granted in the court below. The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

JOHN COX v. THE STATE.

CONTINUANCE. — Affidavit for a first continuance stated that defendant obtained service of subpoena on four out of five absent witnesses who lived in the county of the forum, and disclosed what he expected to prove by each, showing its bearing on the evidence of the State. The court below refused the continuance on the ground that neither diligence nor materiality was shown. But the evidence against the defendant being mainly circumstantial, and this court deeming diligence shown as to the witnesses served, and whose testimony might have influenced the verdict, it is *held*, that the defendant is entitled to a new trial because of the refusal of the continuance.

Opinion of the court.

APPEAL from the District Court of Falls. Tried below before the Hon. L. C. ALEXANDER.

The appellant was tried and found guilty of the theft of a steer, and his punishment was assessed at two years in the penitentiary.

The only question considered by this court is the refusal of the continuance, and the opinion discloses the matters involved. No previous application appears in the record.

Goodrich & Clarkson, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. Among the errors assigned are the following :

“ The court erred in overruling the defendant’s application for a continuance ; and the court erred in overruling the defendant’s motion for a new trial, as set out in his original and supplemental motions for a new trial.”

The reasons for overruling the application for a continuance are set out in a bill of exceptions taken to the ruling of the court, and are :

“ 1. Because it is not shown that due diligence was used to procure the testimony of the witness Garrison, nor is any excuse set out for even lack of diligence.

“ 2. It is not alleged that the matters which the applicant says he ‘ expects to prove ’ by the witnesses O’Neal and McCutchen are true in fact, nor does it appear that the testimony is material.

“ 3. Because it does not appear that the testimony of the remaining witnesses, Brewer and Dickerson, as set out, is material.”

It is further shown in the supplemental motion for a new trial, and affidavits accompanying it, that one of the wit-

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nesses for defendant, who had been summoned, had been kept from attending the trial by threats of personal violence ; and that in the case of the absent witness O'Neal, an attachment had issued, and agreeably to the return on the attachment, the witness, after diligent search, could not be found.

Recurring to the application for a continuance : the statement as to the diligence used by the defendant in order to procure the attendance of the absent witnesses is set out in the affidavit as follows : " That as soon as he was in physical condition, in consequence of gunshot wounds received on the 5th of July, 1878, and as soon as he was able to procure counsel, he caused a subpoena to be issued by the clerk of this court for said witnesses ; that said subpoena bears date 22d day of August, 1878 ; and that said subpoena was executed by the sheriff of Falls County, Texas, on August 27th, 1878, by reading by said sheriff to said witnesses said subpoena, except Garrison."

The names of the absent witnesses are, as stated in the affidavit, Joe Brewer, Ed Dickerson, L. A. Garrison, Edmund O'Neal, and Lida McCutchen, and who, it is stated, reside in Falls County, Texas. The affidavit is otherwise sufficient, the showing as to diligence and materiality being called in question.

It appears from the statement of facts — and the fact is admitted — that the witness Lida McCutchen was, in truth, present at the trial, and testified in the case. The diligence employed as to the witness Garrison was not sufficient, it not appearing why a subpoena had not issued for him at an earlier date than that set out in the affidavit. The affidavit for a continuance also sets out the facts the defendant expected to prove by the several absent witnesses, and their relation to the cause, as it is anticipated the evidence on the part of the prosecution will be.

On the subject of the witness O'Neal being prevented

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from appearing as a witness on the trial, the defendant, in his affidavit appended to his supplemental motion for a new trial, says "that Ed O'Neal was a material witness for him on the trial of his said cause; that his testimony could not be had before the court, for the reason that he was prevented from attending the court because of the threats having been made by persons to affiant unknown, as will appear by affidavits herewith filed."

In one of the affidavits appended, it is stated that the witness Ed O'Neal had lived with affiant during the year, and up to about September 1, 1878; "that on the night of the first day of September, 1878, a party of men, consisting of two or three, came to the house of affiant, between midnight and day, and called and asked if Ed O'Neal was there. Affiant, supposing that he was not there, answered that he was not. They said they knew he was there, and that he had better get away; that he had better not come to court to be a witness in my trial; that if he did, he would wish he had not. Ed O'Neal was at the time lying out in the yard on a bed, where he usually slept; and I said, 'I did not know that you was there at the time.' He had come after I had gone to bed.

"After the men left, I went out to see if he was there, and found that he was, and had heard what the men said. He said he would leave. I advised him not to do so, saying to him that Mr. Cox wanted him as a witness in his case. He said he was afraid to stay. I left him and went back to bed. When I got up the next morning he was gone, and I have not seen him since. Ed O'Neal was a timid man, and easily frightened. I did not know who the men were. I asked them their names, and they would not tell me. It was quite dark, as the moon had gone down." There is another affidavit to the same effect.

We are of opinion that the diligence used, as shown by the affidavit for a continuance, was sufficient, in that the

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subpoena was issued in time for service, and was served on the witnesses Joe Brown, Ed Dickerson, and Edmund O'Neal in time for their attendance at the trial, notwithstanding there had been no service on the witness Garrison, and that the witness Lida McCutchen is shown to have testified on the trial.

On the subject of the materiality of the testimony of the absent witnesses, it is to be viewed in the light of the evidence upon which the conviction was had, that testimony being to a great extent circumstantial. There is strong circumstantial evidence against the defendant. How far the evidence of the absent witnesses would have influenced the jury in their finding we are unable to determine.

Other errors than the two herein considered have been made by the appellant and discussed by his counsel; but, inasmuch as those deemed of any importance are not likely to arise on another trial, it is needless to discuss them here. We are of opinion that, under the circumstances of this case, as shown by the record, the accused is entitled to a new trial; and because this was refused him in the court below, the judgment must be reversed and the cause remanded for that purpose.

Reversed and remanded.

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J. B. PITTS v. THE STATE.

1. **THEFT.** — If the owner of personal property be induced, by false representations, to part with the possession of it, but not with his title, and the wrong-doer appropriates the property without the consent of the owner, the offence is theft.
2. **SWINDLING.** — But if the title to such property be acquired from the owner by false representations, the offence is not theft, but swindling. See the opinion *in extenso* for this distinction between theft and swindling, and for facts illustrative of it.

Opinion of the court.

APPEAL from the District Court of McLennan. Tried below before the Hon. L. C. ALEXANDER.

The opinion discloses the case.

Clark & Dyer, for the appellant.

W. B. Dunham, for the State.

ECTOR, P. J. The appellant, J. B. Pitts, was indicted, tried, and convicted by the District Court of McLennan County for the theft of a bay gelding, the property of one J. Robinson.

The evidence, as shown by the statement of facts, is substantially as follows: J. B. Nixon, on December 9, 1876, took up on his place, in McLennan County, a certain black gelding, which he estrayed. After having complied with the requirements of the statute in regard to advertising said stray, Nixon loaned the stray gelding to appellant, to be worked by appellant on his (Nixon's) farm, until the time came for Nixon to sell said animal. In April or May, 1877, Pitts disappeared from the neighborhood, carrying with him the black gelding. He went to the store of one J. Robinson, a witness for the State, in the city of Waco, McLennan County, and proposed to trade him the black gelding, which he (Pitts) then had with him, representing that the animal was his property, and that he had worked said black gelding in making his crop of the previous year.

Robinson traded with appellant for the black gelding, giving Pitts a bay gelding (the one named in the indictment) and \$20 in money for the black gelding. Appellant traded the black gelding to Robinson without the knowledge or consent of Nixon. Soon after appellant carried off the black gelding, Nixon, finding the animal in the possession

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of Robinson, proved this animal and got possession of him from Robinson. Appellant, on the same day he traded with Robinson, sold the bay gelding in the city of Waco. Robinson testified that the bay gelding was his property, which he traded to appellant, and that he would not have given his bay horse and \$20, or anything else, to Pitts, but for the representations made by Pitts to him at the time of the trade in regard to the black gelding, and that he has never seen the bay gelding (traded by him to appellant) since the day of the trade.

We believe that the facts proven in this case do not, in law, constitute the offence of theft, but of swindling. It is clear from the evidence that Robinson intended to part with his property, the bay gelding mentioned in the indictment, when he traded him to Pitts. The authorities, in drawing the distinction between the offences of swindling and of theft, all seem to rest such distinction upon the fact as to whether the owner of the property, at the time of parting with it, intended to part with the title, or merely the possession of the property. When the title is parted with by the owner, on false representations to induce the owner to sell, the crime is swindling; and, on the other hand, when the owner does not agree to part with the title, but only the possession of the property, the subsequent appropriation is theft. In the one case the owner, by means of false pretences, has been induced to part, not only with the possession, but with his right of possession in the property itself; and in the other case the owner intended to part only with the possession of the property for temporary uses, without ever intending to part with the property itself. This distinction is clearly drawn between the offences of swindling and theft, by the following authorities: *White v. The State*, 11 Texas, 770; *Cline v. The State*, 43 Texas, 494; *Wilson v. The State*, 1 Port. 126; *Ross v. The People*, 5 Hill, 294;

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Murray v. Walsh, 8 Cow. 242 ; 2 Bishop's Cr. Law, 4th ed., secs. 816—818.

The defendant's motion for a new trial in the court below should have been granted. The judgment is reversed and the cause remanded.

Reversed and remanded.

BILL YARBOROUGH v. THE STATE.

VENUE. — The record must show affirmatively that the venue was proved, or the judgment will be set aside.

APPEAL from the District Court of Shelby. Tried below before the Hon. A. J. BOOTY.

Wheeler & Truitt, for the appellant.

George McCormick, Assistant Attorney-General, and *W. B. Dunham*, for the State.

WHITE, J. In this case, we find the following agreement and certificate appended to the statement of facts, viz. :

“ We agree that the foregoing is a statement of all the facts proved on the trial of the cause of *The State of Texas v. Bill Yarbrough*, had at the September term of the District Court of Shelby County, A. D. 1878, to certify which we have hereto set our hands and seals, using scrolls for seals, this the —— day of September, A. D. 1878.

“ JOHN H. TRUITT & F. L. JOHNSON,

“ Attorneys of Record for Defendant.

“ TOM C. DAVIS,

“ Co. Atty. S. C., Texas.”

“ I approve the above and foregoing as a correct state-

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ment of all the facts proven on the trial of this cause, this, the 20th day of September, 1878.

“N. J. BOOTY,
“Judge Second Judicial District of the State of Texas.”
“Filed September 20, 1878.”

Now, if this agreement and this certificate of approval are correct, then we have *all* the facts proven on the trial before us. If we have *all the facts, then the venue was not proven*, or attempted to be proven. Without proving that fact, and showing it affirmatively in the record, there is no reason seen why the officers of the court below should permit a case to be appealed. Under such circumstances, an appeal can only result in a reversal of the judgment and the remanding of the case for a new trial. See authorities *ubique*.

Reversed and remanded.

JAMES BROWN v. THE STATE.

ESCAPE — JURISDICTION AND PRACTICE OF THE COURT OF APPEALS. — Appellant in this case, having been convicted of a felony, effected his escape from the R. County jail, pending the action of this court on his appeal. The appeal had been properly docketed in the “fourth assignment,” but before it was reached, upon proof of escape submitted, and upon motion, the appeal was dismissed, under the act of August 21, 1876. The appellant moves to reinstate the appeal, assigning as causes his voluntary return to jail *before* the fourth assignment was reached by this court, error in the dismissal of the appeal before the time for taking up and disposing of causes under the fourth assignment, and the unconstitutionality of the act of August 21, 1876. *Held*, that the act of August 21, 1876, is constitutional; that the system of assignment is merely conventional, and this court may determine questions in all cases of felony without regard to their position on the docket. And *held, further*, that when the party has effected his escape pending his appeal, and such appeal has been dismissed, this court has no further jurisdiction over the cause.

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APPEAL from District Court of Rusk. Tried below before the Hon. A. J. BOOTY.

N. G. Bagley, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. At the July term, 1878, of the District Court of Rusk County, James Brown, the appellant, was tried and convicted for an assault with intent to murder, with two years in the penitentiary assessed for his punishment.

On August 3, 1878, during said term, his motion for a new trial was overruled, and excepted to, with notice of appeal duly given and entered upon the minutes of the court. A certified transcript of the record for purposes of appeal was duly made out by the district clerk, and transmitted by mail to the clerk of this court, who received it September 24, 1878, and filed and docketed the same as case No. 409, on the fourth assignment, to which assignment appeals from the county of Rusk properly belonged. After this court convened at this place at the present term, but before the time for taking up and disposing of cases on the fourth assignment, a motion was filed by the assistant attorney-general, on October 30, 1878, to dismiss the appeal because appellant had escaped from custody and was then at large. In support of this motion, and as part thereof, he exhibited to the court the affidavit of the sheriff of Rusk County, substantiating the facts therein stated; which evidence proving satisfactory, the appeal was, by this court, dismissed on the said last above-mentioned date, namely, October 30, 1878, and judgment entered accordingly. These proceedings were based upon the "act to amend article seven hundred and twenty-one of the Code of Crim-

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inal Procedure," approved August 21, 1876. Gen. Laws Fifteenth Legislature, 217.

On November 18th, appellant, by counsel, filed his motion to set aside the order and judgment of dismissal, and to reinstate the case on the docket for hearing on the appeal. This motion was based partly upon the affidavits of two deputy-sheriffs of Rusk County, stating that on November 1, 1878, the appellant voluntarily returned and surrendered himself up, was placed in the county jail of Rusk County, and is now there held in confinement. The other grounds of the motion are, in substance :

1. That the order and judgment dismissing the appeal were erroneous, because made before the time for taking up and disposing of causes on the docket of the fourth assignment.

2. Because the act of August 21, 1876, upon which the case was dismissed, is unconstitutional and void.

3. Because of the voluntary return of appellant before the call of the fourth assignment in this court.

This court has heretofore been called upon to pass upon the constitutionality of the act in question, and the validity and efficacy of the act has been upheld and vindicated. See *Gresham v. The State*, 1 Texas Ct. App. 458 ; *Young v. The State*, 3 Texas Ct. App. 384.

Between the Young case and the one at bar there is a striking similarity in the facts. Only one additional question to those there raised is submitted here, and that is the dismissal of this case before the assignment was reached to which it properly belonged, and the further fact that the appellant's voluntary return in this instance was before the day upon which the docket for cases appealed from his county was assigned for trial.

Now, the law is " that all appeals to the Supreme Court [Court of Appeals] in cases of felony may be heard and

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determined by the Supreme Court [Court of Appeals] without regard to their position on the docket." Gen. Laws 1873 (Thirteenth Legislature); Pasc. Dig., art. 3207. Assignments, or the times fixed for taking up and disposing of criminal causes from different localities, are simply conventional arrangements, made before each term by the presiding officers and judges of the court, to subserve the convenience of attorneys representing the parties appealing on the hearing of the cause. Pasc. Dig., art. 1585. They were never intended in any manner to abridge or restrict the right of the court to hear and determine a case at any time when it might be in condition to be finally disposed of.

The language of the act above referred to is, "that in case the defendant shall make his escape from prison during the pending of the appeal, then the jurisdiction of the appellate court shall no longer attach in the case; and upon the fact of such escape being made to appear, the court shall, on motion of the attorney general, or counsel for the State, dismiss the appeal." Gen. Laws Fifteenth Legislature, 217. It follows that a party who has appealed in a felony case, and who effects his escape during the pendency of his appeal, does so at his peril. He, by his own act, deprives this court of its jurisdiction of his case; and when that fact has been made to appear, and his case has been dismissed, this court has no further power or control over it.

The motion to set aside the order to dismiss the appeal in this case and to reinstate it upon the docket for hearing is overruled.

Ordered accordingly.

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SAM JONES v. THE STATE.

1. CHARGE OF THE COURT. — In a trial for wilful burning, the court below charged the jury as follows: "The jury cannot convict the defendant unless convinced that the cotton-house burned was the property of Solomon Dunn, and that it was wilfully burned by the defendant. But, if the house burned (if any was burned) was, at the time it was burned, in the possession and control of the defendant, and was built by him to store his cotton in, and that at the time of the burning his cotton was stored therein, then you are instructed that it would be his house in a legal sense." *Held*, not a charge on the weight of evidence, nor calculated to mislead.
2. PRACTICE IN THIS COURT. — The statement of facts is limited to so much of the evidence as relates to the ownership of the burned structure, and concludes with an agreement of counsel that "the other facts proven were sufficient to sustain the verdict." Nothing in it, or elsewhere in the record, indicates any controversy at the trial about the structure being a *house*, in a legal sense, but the motion for a new trial. *Held*, that in this state of case it will be presumed, on appeal, that the evidence at the trial established the fact that the structure was a house.

APPEAL from the District Court of Harrison. Tried below before the Hon. A. J. BOOTY.

The opinion states the case. The verdict gave the appellant four years in the penitentiary.

A. A. Richards, for the appellant.

George McCormick, Assistant Attorney-General, and *W. B. Dunham*, for the State.

WINKLER, J. The appellant was tried and convicted on the charge of wilfully burning the cotton-house of Solomon Dunn, with 6,000 pounds of cotton therein, charged to have been committed in Harrison County, December 20, 1875.

The main grounds relied on for the reversal of the judgment are, first, that the charge of the court is defective and insufficient, in that it does not give to the jury the statutory definition of a house; and, second, that the

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charge as given was upon the weight of evidence, and calculated to mislead the jury, to the prejudice of the accused.

The statement of facts purports to set out the testimony of the witnesses upon one point only, to wit, "whether it was, or not, proved that the structure burned was a *house*, in a legal sense," — it being agreed that the other facts proved were sufficient to sustain the verdict.

The charge complained of as being defective is as follows : "If you believe from the evidence that, in the county of Harrison, and State of Texas, at any time within three years before the 18th day of February, 1876, the defendant, Samuel Jones, did wilfully burn the cotton-house of Solomon Dunn, you will find the defendant guilty ; otherwise, you will find him not guilty."

The charge claimed to be upon the weight of evidence, and calculated to mislead the jury, is as follows : "You are instructed that you cannot convict the defendant unless you are convinced by the evidence that the cotton-house burned was the property of Solomon Dunn, and that it was wilfully burned by the defendant. But if the house burned (if any was burned) was, at the time it was burned, in the possession and control of the defendant, and was built by him for the purpose of taking care of his cotton, and that at the time it was burned his cotton was stored therein, then you are instructed that it would be his house, in a legal sense." In a subsequent portion of the charge the jury were given this instruction : "By the words 'wilful burning' is meant intentional burning ; a burning other than one that was wilful or intentional would not warrant the conviction of the defendant."

We may as well note, in this connection, that the jury were fully and properly instructed on the subject of circumstantial evidence, and the conclusiveness of this character of testimony in order to warrant a conviction upon it, substantially as laid down in the celebrated case of *The Com-*

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monwealth v. Webster, 5 Cush. 295, and followed by this court in *Hampton v. The State*, 1 Texas Ct. App. 652; and also on the presumption of innocence and reasonable doubt. It should be noticed, further, that the charge, as given, was not excepted to at the trial, and that no additional instructions were asked.

The entire evidence on the controverted propositions, as set out in the statement of facts, is the following:

Solomon Dunn testified that he bought the planks that made the floors of the house; that he bought the boards that covered the roof; that he cut the logs that went into the house off of Brazeal's land; that he bought the nails.

Margaret Dunn, his wife, testified that she knew there was cotton in the house at the time, because she saw it from her dwelling, the previous day; that her dwelling was 300 yards distant; that when she discovered the fire she went near enough to see that the cotton was burning, about a yard square.

We fail to discover from this evidence, or from the record anywhere, that any question was raised as to whether the structure burned was a house or not, or that it was any part of the theory of the defence that it was not in fact a house. The testimony tends to show that it became important to establish by proof the averment in the indictment that the house belonged to Solomon Dunn, and to this proposition the evidence applies. But there is not in the whole record anything from which even an inference can be drawn that, during the trial before the jury, there was any intimation that the structure was not a house. The first intimation in point of time is in the motion for a new trial, when, after the defendant had been convicted, it was claimed that "the State did not prove that the structure burned had walls." The question naturally suggests itself, if there was any importance attached to the subject,—if any question was made about it,—why is it that there is no mention

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made or notice taken of it until after the verdict of guilty was returned?

We are aware that when one is on trial for a felony, it is the duty of the judge who presides at the trial to deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case, and to state plainly the law of the case as made by the evidence adduced under the pleadings, and that he should instruct the jury as to the law applicable to every reasonable deduction to be drawn from the evidence. Still, when he shall have thus plainly charged the law, we know of no law or rule which requires any more at his hands. Code Cr. Proc., arts. 524, 525; *Gibbs v. The State*, 1 Texas Ct. App. 12; *Priesmuth v. The State*, 1 Texas Ct. App. 480; *Bronson v. The State*, 2 Texas Ct. App. 46, citing *Bishop v. The State*, 43 Texas, 390; *Jackson v. The State*, 25 Texas Supp. 229.

We find nothing in the evidence, as set out, which required of the judge any further definition of the crime than set out in the charge; nor, when considered in connection with the evidence, do we discover that it was a charge upon the weight of evidence, or that the charge assumed as true any matter not proved; nor that it could have misled the jury in their finding upon the testimony.

The case before us, though dissimilar as to the facts, is in principle not unlike the case of *Tracy v. The State*, 44 Texas, 9, where the late Chief Justice Roberts, in delivering the opinion of the court, after reciting the facts, said: "When there is thus, in open court, a patent recognition by all the parties concerned in the trial of the existence of necessary facts, they may well be presumed to exist, unless the party interested in their non-existence should avail himself of the opportunity at the proper time to institute a more minute and searching investigation of the subject, for the purpose of rebutting the obvious appearances and assumptions."

It was said in that case, following the extract above:

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“ Having failed in this, the defendant has no right to complain that the court and jury took for granted the evidence adduced, both affirmative, negative, and inferential, the existence of the facts fully, which established that he was an adult male and she a female.”

So we hold in the present case, and especially in the absence of any question as to the facts in evidence during the trial before the jury, that the evidence adduced, both *affirmative, negative, and inferential*, fully established the fact that the edifice burned was a house, within the meaning of the law, and that the court did not err on this account in refusing the defendant a new trial.

The appellant has deprived himself of the benefit of other questions raised on the motion for a new trial, and particularly that portion relating to newly discovered evidence, by having, so far as the evidence is concerned, made a reversal of the judgment depend upon the propositions already considered.

We find no material objection to the judgment. The accused has been fairly tried and legally convicted, and the judgment must be affirmed.

Affirmed.

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A. B. HENDERSON v. THE STATE.

1. CONTINUANCE. — In an application for a second continuance, it is essential to show that the absent testimony upon which the application is based can be procured from no other source.
2. SAME — DILIGENCE. — The mere affirmation of diligence in an affidavit for a continuance does not suffice. The facts must be stated — the date of the issuance of the subpoena, to whom given, when returned, etc. — to enable the court to make the legal deduction as to the diligence; for nothing is to be presumed to aid an application for a second continuance.
3. EVIDENCE — LEADING QUESTIONS. — The allowance of a leading question in the direct examination does not constitute material error, unless it appears that the rights of the defendant were prejudiced thereby, or that the

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question was not allowed, under the recognized exceptions to the general rule.

4. **CHARGE OF THE COURT.** — It is not error to refuse a charge asked, when it has been substantially given in the general charge. It is suggested, however, to inferior courts, that when doubts arise as to the propriety of giving charges asked by defendants, it is best to give them, as no harm could result from the giving.
5. **SAME.** — If the charge of the court is signed by the judge, it is certified as required by law.
6. **VERDICT.** — It is not essential that the verdict of the jury should name the offence of which it finds the defendant guilty. If it finds the "defendant guilty as charged in the indictment" it is sufficient, and identifies the offence.

APPEAL from the District Court of Brazos. Tried below before the Hon. S. FORD.

Brietz & Clark, for the appellant.

George McCormick, Assistant Attorney-General, and *W. B. Dunham*, for the State.

ECTOR, P. J. The defendant, A. B. Henderson, *alias* Bud Henderson, was indicted in the District Court of Brazos County, on February 14, 1878, for the theft of one certain gelding, the property of J. R. Stewart.

At the September term of the court, the defendant submitted an application for a continuance, which was the second motion for continuance made by him. It was overruled by the court; to which ruling defendant took a bill of exceptions. The first assignment of error is that "the court erred in overruling defendant's motion for a continuance."

This application is as follows: "Now comes the defendant in the above cause, and, being sworn, says he cannot go safely to trial because of the following reasons, to wit:

"1. Because of the absence of Wash Henderson, a material witness for his defence, who resides in Brazos County, Texas; that due diligence has been used to procure the attendance of said witness, he having been summoned and

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now being under recognizance to appear and testify. Said witness has been in attendance upon this term of the court since the calling of the criminal docket, from day to day, and is only now absent, as affiant is informed and believes, and so charges to be true, by reason of sickness. Said witness, as affiant is informed and believes, and so charges to be true, is now in bed sick, and unable to attend court. Affiant expects to prove by said witness as follows: It is charged that defendant took the gelding mentioned in the indictment in Brazos County, and the State will prove, or attempt to prove, that defendant so took the gelding in this county and carried it to Waco, in McLelland County, and there sold it, or offered it for sale. Now defendant expects to prove by the said witness that at the date alleged in the indictment, and the date it is alleged, or which will be attempted to be established in evidence, as the date of his taking said gelding to Waco and selling it, or offering it for sale, that defendant was at his home in Brazos County, and remained there, and did not go out of the county.

“2. For the want of the evidence of L. M. Robertson, a material witness for his defence, and who resides in Brazos County, Texas. That defendant did not know, until just a while before the present term of this court, that he could prove by said witness the facts which he expects to establish by him. That he has used due diligence to procure the attendance of the said witness. That on February 14, 1878, and again since the present term of court commenced, and in ample time to secure the attendance of said witness, to wit, on the — day of September, inst., he had a subpoena issued for said witness, but the same has been returned not found. That he expects to prove by the said witness that he, witness, saw one Jess Prather (about the time which it is alleged that defendant took the horse or gelding) in possession of the gelding (which it is charged defendant took), and that he, Prather, was in possession of the said gelding,

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using it and removing with it from Brazos County, or about removing with it from Brazos County, or at least removing a portion of his family from said county. That he saw said Prather with the gelding in question, and that said Prather sought and tried to sell or trade said gelding to the witness Robertson. That said witness is not absent by the procurement or consent of defendant. That this application is not made for delay, but that justice may be done. That the testimony of said witness cannot be procured from any other source than from said witness; and that defendant has reasonable expectation of procuring same by the next term of the court."

The above application was duly sworn to, and subscribed by the defendant.

We believe that the court did not err in overruling defendant's application for a continuance. It does not appear that the facts expected to be proved by the witness Henderson could be proved by no other witness, — this being a second application. And because no sufficient diligence was shown, in the motion for continuance, to procure the attendance of the other witness, Robertson.

The application for continuance on account of the witness L. M. Robertson is too vague and indefinite, both in stating the diligence used and the facts expected to be proved by him. It states that defendant procured subpoenas for him, but does not state in what case. It does not state the date when the second subpoena was issued, to whom it was given, or when returned. It does state that it was issued in time to have procured the attendance of the witness. It should have given the date when issued, to whom given, and when returned, to enable this court to determine whether defendant had used due diligence to procure the attendance of the witness Robertson at the trial. Nothing is to be presumed in aid of a second application for continuance. The mere affirmation of diligence in the affidavit for a continuance does not constitute the grounds for a con-

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tinuance exacted by the statute. The facts must be stated, from which the court has to make the legal deduction of diligence. *Murray v. The State*, 1 Texas Ct. App. 174.

On the trial of the cause, the county attorney asked the State's witness, Joe Herbert, the following question: "Did Dr. Stewart tell you to turn this gelding out on the range when you had finished breaking him?" To which question defendant objected, because the same was leading, and because the answer suggested must be hearsay testimony, and because the same is irrelevant; which objections were overruled by the court, and the witness Herbert was allowed to answer the question. This ruling of the court is assigned as error by defendant.

The allowance of a leading question in the direct examination of a witness does not constitute material error, unless it appears that the rights of a defendant are prejudiced thereby, or that the question was not allowed under recognized exceptions to the general rule. *Montgomery v. The State*, 1 Texas Ct. App. 140; Greenl. on Ev. 434, 435.

The evidence of Stewart, the owner of the gelding described in the indictment, shows that Herbert was his agent, breaking the animal, and his evidence in response to the question asked was not hearsay. 1 Greenl. on Ev. 101. Stewart had already testified that, a short time previous to the loss of the gelding, he had hired Herbert to break said gelding, and that he told Herbert, at the time of hiring him, that as soon as he should get the gelding broke to turn him loose on the range. The rights of defendant were not prejudiced by allowing the witness Herbert to answer the question.

What we have said on the third will apply to the next error assigned, which refers to the action of the court in refusing, on motion of defendant, to exclude from the jury the answer of the witness Herbert to the question of the county attorney already copied.

There was manifestly no error in the refusal of the court

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to give the instructions asked by the defendant. The defendant "asked the court to charge the jury that, in order to convict the defendant, they must believe, beyond a reasonable doubt, that the gelding testified about by Dr. J. R. Stewart as the one stolen from him was the same identical gelding testified to by Viola Burton as being in the possession of the defendant; and this they must believe from the evidence." This instruction was refused, because, in the opinion of the court, it had already been given. The fourth instruction given by the court to the jury is as follows, to wit: "If the jury should believe from the evidence that the defendant was seen in possession of a gelding, and also should believe from the evidence that a gelding of J. R. Stewart had been taken by some one about the same time, then, to warrant them in convicting the defendant in this case they must be satisfied from the evidence, beyond a reasonable doubt, that the gelding seen in possession of defendant and the gelding described in the indictment as the property of J. R. Stewart was the same animal; and they must also be satisfied of the existence of every fact necessary to constitute theft as defined in the first article of these charges." We believe the charge asked was substantially given in the fourth subdivision of the charge of the court, which fairly presented to the jury the question of the identity of the animal seen by Viola Burton in possession of the defendant, and the one stolen from Stewart. No witness except Viola Burton testified to seeing defendant in possession of a gelding. The charge of the court directed the minds of the jury with proper force to the important fact on which the charge asked by defendant was based. We would suggest, however, when there is any doubt in the mind of the court as to the propriety of giving any instruction to the jury that is asked by a defendant, it would be well to give it. No harm would result from giving it, and, besides, much of the valuable time of this court would usually be saved.

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In response to the objections made to the verdict of the jury, we believe they are not tenable. It is insisted, on the part of the defendant, that "the verdict of the jury does not adjudge accused guilty, and name the offence of which he is found guilty." The jury returned into court the following verdict: "We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment in the penitentiary for a term of six years." There can be no doubt of what offence the jury intended to find the defendant guilty. In construing verdicts, the object is to arrive at the meaning of the jury. We may look to the charge of the court in interpreting a verdict. The objection to the verdict is altogether too technical. *Lindsay v. The State*, 1 Texas Ct. App. 328; *Marshall and Williams v. The State*, Ct. App. October term, 1878.

The next assignment of error is: "It does not appear from the record that the charge of the court was given to the jury, and certified as required by law." This assignment needs no remark beyond saying that the charge of the court is signed by the judge. As he acts under his oath of office, this is a sufficient compliance with the statute. Pasc. Dig., art. 3062; *Hubbard v. The State*, 2 Texas Ct. App. 506.

We believe the evidence is sufficient to sustain the judgment. We have given the questions in the record before us that careful and patient consideration which the importance of the case demands; and, after the strictest scrutiny, we find no error which would justify a reversal of the judgment, and it is, therefore, affirmed.

Affirmed.

Statement of the case.

STEPHEN M. ROBERTS v. THE STATE.

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1. **JURY — SPECIAL VENIRE.** — The law of 1876 makes no provision as to the course to be pursued in supplying juries in capital cases after the special *venire* has been exhausted, as provided for in section 28. Nor does that law repeal all of the previous laws upon the subject of selecting and empanelling juries, but such only as conflict with its provisions. Verbal order of the court to the sheriff to summon talesmen, out of whom to complete the jury, after a special *venire* and the jury-box were exhausted, is not error.
2. **SAME.** — It is too late after verdict to complain that accused has not been served with a copy of an indictment, and special *venire*.
3. **EVIDENCE — MURDER.** — Evidence to prove the violent character of the deceased, in the absence of proof that the accused was in danger of bodily harm at the time of the killing, was properly excluded.
4. **PRACTICE.** — This court will not reverse the action of the court below in admitting or excluding evidence, unless it appears that objection was made when it was offered, and bill of exceptions reserved.
5. **DYING DECLARATIONS,** made under the restrictions of the statute, and stating the circumstances under which the declarant received the mortal injury, may be given as evidence in a prosecution for killing him. Nothing can be evidence in a declaration *in articulo mortis* that would not be evidence if the party were sworn. What the person *in articulo mortis* said as to facts is admissible, but not what he said of opinion. "S. R. killed me for nothing" states a *fact*, beyond opinion, and is admissible.
6. **SAME.** — The substance of the declaration may be given in evidence, if the witness cannot give the precise language.
7. **MURDER — CHARGE OF THE COURT.** — It would have been error on the part of the court if it had instructed the jury on manslaughter, when the evidence showed the offence to be murder, in either the first or second degree.
8. **SAME — DEGREE AND MALICE.** — The court instructed the jury on murder in the first and second degrees, and on malice, express and implied, giving clearly the statutory definitions. *Held*, sufficient, in view of the evidence.
9. **CHARGE OF THE COURT.** — The official signature of the judge to the charge of the court is a full compliance with the article of the Code of Procedure which requires that the charge of the court be certified by the judge.

APPEAL from the District Court of Panola. Tried below before the Hon. A. J. BOOTY.

The indictment charges the appellant with the murder of Henry M. Johnson, in Panola County, on November 18,

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1872. The conviction was for murder in the first degree, for which the jury, exercising the power conferred by the Constitution of 1869, assessed the punishment at imprisonment for life, with hard labor.

The witness Guise, testifying for the State, swore that, some twenty or thirty days before the killing, he had a conversation with the appellant, during the course of which the appellant stated to witness that he had had trouble with his wife's people (appellant being a son-in-law of deceased), and that if he, appellant, was interfered with, he intended to kill some of them.

Mrs. Hamons, a daughter of the deceased, testifying for the State, swears that appellant came to her father's house on November 18, 1872, riding one and leading another horse, which he tied together and left tethered to the fence gate. He sat by the fire in the family sitting-room, talking friendly with deceased for some time, and finally asked the loan of deceased's wagon-harness. Deceased replied that he would need it next morning himself, to go to Marshall for family supplies, but that if appellant would await his return he could have the loan of the harness. Appellant and deceased remained some time longer, conversing by the fire in a friendly manner, the appellant finally inviting the deceased to walk out to the fence to inspect appellant's new, fine horse. The witness retired to the kitchen, to write on the dining-table, and soon heard the voices of appellant and deceased, which proceeded from the direction of the saddle or harness-house, which stood some eighteen or twenty yards off west, and fronting the kitchen door. She looked, and saw the appellant and the deceased confronting each other, appellant with a pistol presented at the deceased. She ran into the front part of the house and notified her sister, Mrs. Ellen Rector, that appellant was pointing a pistol at their father. The witness and Mrs. Rector ran, screaming, towards the harness-

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house, observing as they ran that the appellant still had the pistol presented at the deceased. She heard the deceased say, "Don't shoot me, Steve," and then saw appellant shoot, when she turned and ran back towards the house. In a few seconds she heard the second shot, after which appellant ran out of the gate, mounted one of his horses, and rode rapidly away. Witness is a sister-in-law of appellant.

The testimony of Mrs. Ellen Rector is exactly the same as that of her sister, Mrs. Hamons; going further, in that she swears that the first effort to fire, *after* the first shot, was a failure, when the defendant lowered his pistol to about the middle of his body and worked with it, as though capping it, after which he raised it and fired the second shot, at which the deceased put his hand on his stomach and started towards the house, falling when half way. Appellant ran out of the gate, and, on reaching his horse, looked back and cried out, "D—n you, I have killed you," and then mounted and rode away. Both witnesses swear that deceased had no weapon of any kind on his person.

Yarborough, witness for the State, swears that he was sent for to sit with and wait on the deceased the evening he was shot; and that next morning the deceased, in possession of all his mental faculties, but conscious of approaching death, of his own free will, voluntarily, and without interrogation or solicitation on the part of witness, spoke of his conviction that he would not recover; and stated, further, that the appellant had demanded of him the loan of his wagon-harness, which being refused by deceased, as he intended using it on a trip to Marshall, though offered as soon as he returned, the appellant answered that "By G—d, he had come for the harness, and he intended to have them," to which the deceased said he responded, "I would like to see you get

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them ;” whereupon, as the deceased informed witness, the appellant commenced shooting. The deceased told the witness that “ Steve Roberts killed him for nothing.”

The attending physician swears that the death of deceased proceeded from gunshot wounds ; and the sheriff of Panola County swears that he has had a *capias* for the arrest of appellant since his indictment, shortly after the killing, but could not find him, until he arrested him in Florida, about January, 1878.

The State closed, and appellant offered no testimony.

Field & Oliver, for the appellant.

W. B. Dunham, for the State.

ECTOR, P. J. The defendant was tried and convicted for the murder of one Henry M. Johnson, and his punishment fixed by the jury at confinement in the penitentiary for life.

In responding to the errors assigned, upon which we feel called upon to comment, we will follow the order in which they have been presented by the counsel who have briefed and argued the case for the defendant. The first error assigned is, that the District Court erred “ in overruling defendant’s motion to quash the additional special *venire* in the case, as shown by defendant’s bill of exceptions.”

As it appears from the bill of exceptions, “ a special *venire* having been ordered, was exhausted, and only six jurors selected for the trial of the cause. The court thereupon ordered the sheriff, verbally, to summon twenty additional persons to supply said *venire*; which, when returned, was excepted to, and defendant moved to quash the same because the names of the persons constituting said special *venire* of twenty men were not drawn from the list of names selected by the jury commissioners as jurors to serve

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for this term of the court ; which motion to quash was overruled by the court, and the said *venire* of twenty put upon the defendant, to which he excepted."

The act of August 1, 1876, in regard to juries, provides as follows: "Sec. 23. Whenever a special *venire* shall be ordered, the names of all the persons selected by the jury commissioners to do jury service for the term at which such *venire* is required shall be placed upon tickets of similar size and color of paper, and the tickets be placed in a box, which shall be well shaken up, and from this box the clerk, in the presence of the judge, in open court, shall draw the number of names required for said special *venire*, and the names of the persons so drawn shall be attached to the writ of the special *venire facias*, and the persons named shall be summoned by the sheriff, or other lawful officer, by virtue thereof; provided, that when the whole number of jurors selected by the jury commissioners for any term of the court be less than the number required upon said special *venire*, the judge shall order the sheriff to summon a sufficient number of good and intelligent citizens, having all the qualifications of jurors prescribed in this act, to supply the deficiency; provided, that, in supplying the deficiency, it shall not be lawful for the sheriff, or any other officer, to summon as a juror any person within the court-house or yard, if they can be had elsewhere." Gen. Laws 1876, p. 83, sec. 23.

As we understand the record, there is no objection to the manner of selecting the six jurymen chosen out of the original *venire*. The first special *venire* consisted of sixty men. It does not affirmatively appear that, after the original *venire* was exhausted, there remained any of the jurors selected by the jury commissioners for the term.

There is no provision made in the jury law of 1876 as to the course to be pursued in completing a jury in a capital case, after the special *venire*, as provided for in section

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23 of said act, has been exhausted. This court has held that the act known as the jury law of 1876 does not repeal all previous laws upon the subject of selecting and empaneling juries, but only such as conflict with its provisions; and that section 22 of said act has reference to the formation of the regular juries of the term, and does not apply to the manner of selecting juries in capital cases. *Taylor v. The State*, 3 Texas Ct. App. 169; *Harrison v. The State*, 3 Texas Ct. App. 563; *Johnson v. The State*, 4 Texas Ct. App. 269. We believe that the district judge who presided at the trial did not err, after the special *venire* was exhausted, in verbally ordering the sheriff to summon twenty talesmen, out of which to complete the jury, as was done in this case. Pasc. Dig., art. 3030.

The second error assigned is, that the court erred in refusing to sustain the objections of the defendant to the evidence of G. W. Yarborough, as shown by bill of exceptions. The record does not show that any objection, or bill of exceptions, was taken by the defendant to the testimony of Yarborough when it was offered. On the contrary, it appears therefrom that his testimony was admitted without any objection to it on the part of the defendant.

The defendant asked the witness Yarborough if he “knew Henry M. Johnson, in the neighborhood in which he lived, for peace or violence, when aroused.” This question was objected to by counsel representing the State, and the objection was sustained by the court. To this ruling defendant excepted, and tendered a bill of exceptions. The court, in signing this bill, makes the following explanation: “I approve the foregoing bill of exceptions, and state that the objections made by the State’s counsel were that there was no evidence that deceased was aroused at the time of the shooting; and, further, that the question asked embodied no intelligent idea. I did sustain the objection to this particular question, and informed defendant’s counsel that he

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might propound, in any form he wished, a question embodying an inquiry as to whether the deceased, from his general reputation, was a man of violent or dangerous character, or a man of peaceable and inoffensive character; and that defendant's counsel declined to propound any but this particular question."

There was manifestly no error in this ruling of the court. The statement of facts affords no evidence of any action on the part of the deceased that was necessary to be explained; no evidence of an assault or threat, or any action by Johnson showing an intention on his part to assault the defendant. The witnesses to the homicide testify that, at the time of the killing, Johnson was standing still, doing nothing, and the only words he was heard to utter were, "Steve, don't shoot me." The evidence leaves no doubt upon the question as to whether or not the killing was done in self-defence. Under such proof, no evidence was admissible as to the character of the deceased for violence. The particular question, as asked, was certainly objectionable. As a general rule, evidence as to the character of the deceased is not admissible, the character being no part of the *res gestæ*. The correct rule of evidence in such cases is laid down by Mr. Wharton. He states the facts or circumstances under which such evidence is admissible. Whart. Cr. Law, 641.

Our Supreme Court, in the case of *Horbach v. The State*, 43 Texas, 242, held that, in a prosecution for murder, the general character of the deceased may be proved, when it would serve to explain the actions of the deceased at the time of the killing; but the actions it must serve to explain must first be proved before permitting evidence of the character of the deceased, and if no such acts are proved, its rejection is not error.

And this court, in the case of *Stevens v. The State*, 1 Texas Ct. App. 591, after recognizing the rule of law as

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laid down by Mr. Wharton, proceeds to say that, in trials for murder, the reputation of the deceased cannot be given in evidence, unless the circumstances of the case raise a doubt in regard to the question as to whether the prisoner acted in self-defence. It is no excuse for murder that the person murdered was a bad man ; but it has been held that the reputation of the deceased may be given in evidence to show that defendant was justified in believing himself in danger of losing his life, or of sustaining serious bodily injury from the deceased.

The testimony of the witness Yarborough principally relates to the dying declarations of Johnson. Johnson was the father-in-law of the defendant. The witness Yarborough was a neighbor of the deceased. Yarborough testified that he stayed with Johnson the night after he was shot, and that “ on the next morning, after the doctors who had been called in to see Johnson had left, he was sitting by the bed of Johnson, and that he, Henry M. Johnson, told witness that he had no hopes of getting well, and that he could not live much longer ; and that he commenced talking to witness about being shot, and told witness, without his (witness’s) asking him any question, and voluntarily, — and he was rational at the time he made the statement, — that S. M. Roberts asked him for his wagon-harness, and that he told Roberts he wanted to use them the next day, to go to Marshall after family supplies, but that if he would wait until he got back he might have them ; that Roberts then told him that ‘ By G—d, he had come after the harness, and that he intended to have them ; ’ that he (Henry M. Johnson) told Roberts he would like to see him get them ; that Johnson said ‘ Steve Roberts had killed him for nothing.’ ” On cross-examination, the witness Yarborough testified “ that he could not say he could tell what deceased said to him in his (deceased’s) statements, in the exact language used by the deceased ; that the statement was made six years ago,

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but that he could give the substance of it.” Johnson was shot on the 18th and died on the 20th of November, 1872.

As we have before stated, so far as the record speaks, no objection was made to the dying declarations of Johnson when they were offered in evidence. Without a bill of exceptions, the well-established rule is not to reverse, on appeal, the action of the court below as to its rulings in either admitting or excluding evidence. *Brown v. The State*, 2 Texas Ct. App. 121; *Black v. The State*, 3 Texas Ct. App. 585.

One of the grounds set out in defendant’s motion for new trial was, “Because the court allowed witness G. W. Yarborough to testify to the statements of the deceased; he, Yarborough, having stated that he could give only his best impression as to what the substance of deceased’s statements were.” By reference to Yarborough’s testimony, which we have given from the statement of facts, it will be seen that Yarborough testified he could give the substance of what deceased’s statements were. The substance of the dying declarations may be given in evidence, if the witness is not able to state the precise language used. 1 Greenl. on Ev., sec. 161.

The restrictions under which such declarations are admissible are clearly defined by the Code of Criminal Procedure. “The dying declarations of a deceased person may be offered in evidence, either for or against a defendant charged with homicide, under the restrictions hereafter provided. To render the declarations of the deceased competent evidence, it must be satisfactorily proved: 1. That at the time of the making such declarations he was conscious of approaching death, and believed there was no hope of recovering. 2. That the declaration was voluntarily made, and not through the persuasion of any person. 3. That such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement. 4.

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That he was of sane mind at the time of making the declaration." Pasc. Dig., art. 3125. The testimony of the witness Yarborough satisfies us that the statements of Johnson were admissible as dying declarations, under the statute.

The only question which could arise would be as to whether or not that part of the statement which is as follows: "that Johnson said that Steve Roberts had killed him for nothing," comes within the meaning of dying declarations. The declarations of a person who expects to die, given under the restrictions required by the statute respecting the circumstances under which he received a mortal injury, are admissible in a prosecution for killing the person making the declarations. Nothing can be evidence in a declaration *in articulo mortis* that would not be so if the party were sworn. On this rule, says Mr. Wharton, "what the person *in articulo mortis* says as to the facts is receivable, but not what he says as a matter of opinion. Hence the declaration, 'It was E. W. who shot me, though I did not see him,' is inadmissible. But when, in making a dying declaration, the declarant, in speaking of the fatal wound, said it was done without any provocation on his part, it was held in Ohio that this declaration was not incompetent, it relating to fact, not opinion." Whart. on Hom., sec. 765; *Wroe v. The State*, 20 Ohio St. 460.

In the fourth and fifth errors assigned, the defendant insists that the court did not charge the law as applicable to the facts of the particular case on trial; that the charge of the court on murder in the first degree was confused, and calculated to mislead the minds of the jury rather than to inform them on the subject, and that it was erroneous in defining murder in the second degree, and especially in the explanation of implied malice, as given in his second charge. The charge of the court defined murder in the language of the statute. It drew the proper distinction between murder in the first and murder in the second degree, gave the legal

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definition of express and implied malice, and fully instructed the jury under what circumstances a person was justifiable in killing another in self-defence. The court also gave the defendant the benefit of a charge on the law of self-defence. We believe that the charge of the court is perfectly unexceptionable, and is worthy of commendation for the clearness and accuracy in which the jury are instructed as to the law which is applicable to the facts in evidence. There was not a particle of evidence upon which the jury could have found that the homicide was committed under the immediate influence of sudden passion, arising from an adequate cause. The case, as made by the evidence, was either murder of the first or murder in the second degree. It would, therefore, have been improper for the court to have submitted to the jury an instruction upon manslaughter. No such instruction was asked in this case. *Halbert v. The State*, 3 Texas Ct. App. 661; *Daniels v. The State*, 24 Texas, 389. In drawing the distinction between express and implied malice, the court below has closely followed the leading cases in our courts. See *McCoy v. The State*, 25 Texas, 33; *Farrer v. The State*, 42 Texas, 271; *Halbert v. The State*, 3 Texas Ct. App. 659.

The court, at the request of the jury, gave them an additional instruction upon the subject of implied malice. The Code of Procedure provides that "the jury, after having retired, may ask further instructions of the judge on any matter of law, which shall be given them in writing; but no charge shall be given except upon the particular point on which it is asked." Pasc. Dig., art. 3079. The additional charge in writing in this case, which was given by the court at the request of the jury, defines implied malice in the exact language of Mr. Justice Moore in *Farrer v. The State*, 42 Texas, 271; and the reference to express malice was necessary and proper, in order that the jury might clearly understand the legal signification of the terms

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“implied malice,” as distinguished from “express malice.” No distinct and complete idea of implied malice can be conceived, unless express malice is at the same time understood.

The first, second, and third grounds set forth in defendant’s motion for a new trial are as follows :

“1. Because the defendant was not served with a copy of the indictment, as required by law, two days before the trial, and because defendant was never served with a copy of the indictment on which he was tried.

“2. Because the defendant was not served with a copy of the *venire* summoned especially to try the cause.

“3. Because the copy of the *venire* served on the defendant was not a copy of the *venire* as summoned and returned by the sheriff,” etc.

These objections came too late after verdict, in a motion for new trial. *Houillion v. The State*, 3 Texas Ct. App. 537 ; *Johnson v. The State*, 4 Texas Ct. App. 268 ; *Harrison v. The State*, 3 Texas Ct. App. 558.

The charge of the court was signed by the judge officially, and filed, as appears from the record ; and this is a sufficient compliance with the article of the Code of Procedure which requires that the charge given by the court shall be certified by the judge.

We have examined every question raised in the case at bar with that scrutiny and care which the importance of the case demands, and we have found no error which would authorize a reversal of the judgment. The statement of facts shows abundant proof of malice, and that the killing of Henry M. Johnson by the defendant was a wanton, cruel, and deliberate murder. The defendant had a fair and impartial trial, and was ably defended. It simply remains for us to discharge our duty, and affirm the judgment of the District Court.

The judgment is affirmed.

Affirmed.

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JOHN CARR v. THE STATE.

1. **INDICTMENT.** — Indictment charges that the defendant “did then and there pursue the occupation of selling spirituous liquors in quantities less than one quart, without first obtaining a license therefor, and has not since paid the tax on such occupation.” *Held*, sufficient.
2. **CHARGE OF THE COURT.** — In misdemeanors the court below may, with the consent of the parties, give its charge verbally. The general charge given by the court, as well as those given or refused at the request of either party, shall be certified by the judge, and, in case of appeal, shall constitute a part of the record of the cause. When the charge is not signed and certified by the judge, the judgment will be set aside.
3. **SAME.** — Unless the record of a misdemeanor case discloses the charge of the court, this court will presume that none was given, or that the jury was instructed verbally by consent of the parties, and that, if the latter was the fact, the charge was correct.

APPEAL from the County Court of Robertson. Tried below before the Hon. J. J. KENDRICK, County Judge.

The opinion of the court sufficiently discloses the case.

Oltorff & Preston, and *Fulmore & Jackson*, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. The indictment in this case charges that the defendant “did then and there pursue the occupation of selling spirituous liquors in quantities less than one quart, without first obtaining a license therefor, and has not since paid the tax on such occupation,” etc.

A motion was made to quash the indictment, which was overruled, and this is one of the errors properly presented for revision. The charge is substantially in the language of the statute creating the offence. Gen. Laws 1875 (Fourteenth Legislature, 2d Sess.), p. 94. Similar indictments have been held good in the following cases, viz.: *Harris et*

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al. v. The State, 4 Texas Ct. App. 131; *Languille v. The State*, 4 Texas Ct. App. 313; *Tonella v. The State*, 4 Texas Ct. App. 325; *Munch v. The State*, 3 Texas Ct. App. 552.

It is only necessary that we should notice one other error assigned and complained of, since that will dispose of the case upon this appeal. We find in the transcript a paper purporting to be the charge of the court, as given to the jury on the trial, but it is not signed or otherwise certified to by the judge.

The rules relative to charges in misdemeanor cases are as follows:

“In all criminal actions for misdemeanor, the court is not required to charge the jury, except at the request of counsel on either side; but, when so requested, shall give or refuse such charges, with or without modification, as are asked, in writing.” Pasc. Dig., art. 3063.

“No verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties.” Pasc. Dig., art. 3064; *Chamberlain v. The State*, 2 Texas Ct. App. 451.

“When charges are asked, the judge shall read to the jury only such as he gives.” Pasc. Dig., art. 3065.

“The general charge given by the court, as well as those given or refused at the request of either party, *shall be certified by the judge*, and, in case of appeal, constitute a part of the record of the cause.” Pasc. Dig., art. 3062.

A departure from these rules is, by the express terms of Paschal's Digest, art. 3067, a specific ground for reversal, “provided that it appears by the record that the defendant excepted to the order or action of the court at the time of the trial.” In this case the charge of the court was excepted to, and this specific objection is one of the errors assigned. The following authorities are cited upon the question: *Wheelock v. The State*, 15 Texas, 256; *Smith v. The State*, 1 Texas Ct. App. 408; *Vanwey v. The State*,

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41 Texas, 639; *Franklin v. The State*, 2 Texas Ct. App. 8; *Killman v. The State*, 2 Texas Ct. App. 222; *West v. The State*, 2 Texas Ct. App. 209; *Hubbard v. The State*, 2 Texas Ct. App. 506; *Goode v. The State*, 2 Texas Ct. App. 520; *Long v. The State*, 4 Texas Ct. App. 81.

In a misdemeanor case, where no charge appears in the record, this court will presume that no charge, or a verbal charge, was given by consent of parties; and if the latter, that the charge so given was correct. *Bowden v. The State*, 2 Texas Ct. App. 56; *Newton v. The State*, 3 Texas Ct. App. 245.

Because the charge of the court was not signed or certified to by the judge, the judgment is reversed and cause remanded.

Reversed and remanded.

J. J. ROBERTSON v. THE STATE.

1. **INDICTMENT — LOCAL-OPTION LAW.** — An indictment or information for the sale of spirituous liquors in a locality where the local-option law is in operation should charge the offence under that law, and not under the general law prohibiting the sale of such liquors in quantities less than a quart, without first having paid the tax imposed.
2. **SAME.** — Wherever the local-option law has been adopted, in accordance with the Constitution, and been put in force, it operates to repeal all laws and parts of laws in conflict with it, within the limits of such locality. The general law imposing an occupation-tax on retail liquor-dealers is not in force in localities where the local-option law has been adopted.

APPEAL from the County Court of Williamson. Tried below before the Hon. D. S. CHESSLER, County Judge.

The indictment in this case charges the defendant with having pursued and followed the occupation, calling, and profession of selling vinous, spirituous, and intoxicating liquors in quantities less than one quart, without first having

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obtained a tax-receipt from the proper officer as a sufficient license therefor," etc. On the trial in the County Court, the defendant moved to quash the indictment because it charged no offence against the laws of the State, so far as Williamson County is concerned, the law known as the local-option law being in force in said county. The motion to quash was overruled, and the defendant appealed, assigning as error the refusal of the court to sustain such motion.

Makemson & Fisher, Posey & Dalrymple, and B. Trigg, for the appellant, filed able briefs and arguments.

George McCormick, Assistant Attorney-General, for the State.

B. E. Chrietzberg, County Attorney, for the State, traversing the positions assumed by the appellant, insists that there is no such repugnance between the local-option law and the occupation-tax law as that both may not stand. The latter imposes a tax upon those who pursue the occupation of selling liquors in quantities less than a quart, exempting druggists who sell for medical purposes. The local-option law imposes a further *regulation* and *restriction*, and provides that not only druggists shall not sell, but that no person shall sell intoxicating liquors *except* in actual cases of sickness, and not then *except* upon the written prescription of a regular practising physician, certifying that the same is to be used for medicine. The appellant, complying with the provisions, regulations, and restrictions of the local-option law, procures the prescription of physicians, and, under them, sells the intoxicating liquors, pursues the occupation of selling such liquors in quantities less than a quart, without first paying the occupation-tax imposed by the act of August 21, 1876, and in direct violation of the penal law of March 13, 1875, p. 94.

The appellant, without proving that he sold as a drug-

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gist, exclusively for medical purposes, claims that because he "sold under prescription" he is relieved from paying the occupation-tax. Is such a position tenable? Can the State be deprived of her revenue in any such manner? Should he remove his stock of liquors to a locality where the local-option law had no operation, would a thousand prescriptions for each sale (without proof that, as a druggist, he sold for medical purposes) exempt him from the payment of the tax? Assuredly not. Then in Williamson County, where the local-option law is in force, he would be liable for the same tax; because the local-option law, though it throws additional restrictions around his occupations, does not prohibit it.

The Legislature may have intended to suspend the occupation-tax law in counties where the local-option law should operate, or it may not so have intended. The question is, Can it be gathered from the two laws (the occupation-tax and the local option) that it was the will of the Legislature that, in counties where the local-option law operates, if prescriptions could be procured, and the afflicted should abound in sufficient numbers to make the retail liquor business profitable, that therefore the business might be pursued without the payment of the tax imposed upon it everywhere else in the State? Such a course of taxation would be unequal, and, therefore, unjust.

The Legislature has not sought in the local-option law to abolish any right of property in liquor, or the right to sell it, either in large or small quantities. It is sought only to *regulate* its sale, by prescribing to whom, and upon what conditions, it may be sold. *Hewitt v. The State*, 25 Texas, 726; Local-Option Law of 1876.

Though in the local-option law the words "absolutely prohibiting the sale of intoxicating liquors," etc., are used, yet in the same section occur two broad exceptions and provisos, and by virtue of these exceptions and provisos

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the act becomes a *regulation*, instead of a prohibition. *Duke v. The State*, 42 Texas, 460. And, if so, the appellant is clearly guilty of a violation of the occupation-tax law.

WINKLER, J. The appellant was charged by indictment with purusing the occupation of selling vinous, spirituous, and intoxicating liquors in quantities less than one quart, without having paid the tax imposed by law on such occupation. The offence is charged to have been committed in Williamson County, on the 12th day of July, A. D. 1877.

The accused moved the court to quash the indictment, upon the following grounds :

“1. Because the indictment charges no offence known to the laws of the State.

“2. Because the indictment does not charge any offence known to the laws of the State of Texas, so far as the same apply to the county of Williamson, for the reason that the local-option law went into effect and force in Williamson County on the 17th day of February, 1877, and is now, and has continued, in force from that date till this present.”

This motion was by the court overruled, and to the ruling of the court the defendant's counsel took a bill of exceptions, following it up in his motion for a new trial, which was also overruled, and to which ruling the defendant again took a bill of exceptions. The same question — as to the sufficiency of the indictment — was again presented in a motion in arrest of judgment, which being also overruled, the accused again took a bill of exceptions, and gave notice of appeal.

The first error assigned is the refusal of the court to quash the indictment. We pause here to note the fact, and to commend the practice, that to every action of the court of which complaint is made the question is presented by regular bill of exceptions taken on the trial below, and presented by the record.

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It is not necessary that we should mention any other of the errors assigned, as the view we take of the indictment, and of the objections taken to it in the motion to quash, as above set out, is in our opinion decisive of the case, and in favor of the appellant. The only question is this: Will an indictment lie for retailing spirituous, vinous, and other intoxicating liquors without payment of the tax imposed by the general laws of the State, in a county which has adopted the local-option law?

This law rests, as its foundation, upon section 20 of article 16 of the State Constitution, which is as follows: "The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town, or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

In obedience to the demands of this constitutional provision, the Legislature did, at its first session, enact a law, the title of which is the following: "An act to prohibit the sale, exchange, or gift of intoxicating liquors in any county, justice's precinct, city, or town in this State that may so elect; prescribing the mode of election, and affixing a punishment for its violation." The general scope and tenor of the act are indicated in the title. The first section directs the manner of setting on foot the law, making it the duty of the Commissioner's Court of each county in this State, upon the written petition of fifty qualified voters of said county, or upon such petition by twenty qualified voters of any justice's precinct, town, or city, as the case may be, to provide for an election to determine whether the sale of intoxicating liquors, and medicated bitters producing intoxication, shall be prohibited in said county, justice's precinct, town, or city, or not; to which said first section is appended the following proviso, to wit: "*Provided*, that nothing herein con-

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tained shall be construed to prohibit the sale of wines for sacramental purposes, nor alcoholic stimulants as medicine, in case of actual sickness, when sold upon written prescription of a regular practising physician, certifying upon honor that the same is actually necessary as a medicine.”

Other sections of the act direct the manner of ordering, holding, and publishing the result of such election, and fixing the period within which subsequent elections may be held; and by the fifth section it is declared that “when any such election has been held, and has resulted in favor of prohibition, and the aforesaid court has made the order declaring the result and the order of prohibition, and has caused the same to be published as aforesaid, every person or persons who shall thereafter, within the prescribed bounds of prohibition, sell, exchange, or give away, with the purpose of evading the provisions of this act, any intoxicating liquors whatsoever, or in any way violate any of the provisions of this act, shall be subject to prosecution, by information or indictment, and shall be fined in a sum not less than twenty-five nor more than two hundred dollars for each and every violation of any of the provisions of this act.” And, among other things, it is provided by the seventh and concluding section that “all laws and parts of laws in conflict with this act are hereby repealed.”

In the statement of facts agreed to by counsel for the State and for the defendant, and approved by the county judge, it is admitted that the “local-option law went into effect in Williamson County, over the whole of said county, on the 17th day of February, A. D. 1877, and is still in force in said county.”

The argument in support of the prosecution appears to be, in effect, that the occupation-tax law of 1876 and the local-option law of the same Legislature should be so construed as that both may stand; that the Legislature never intended

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to deprive the State of the revenues to be derived from the sale of liquors in quantities less than a quart, by the enactment of the local-option law prohibiting its sale.

That the Legislature did not so intend is not a legitimate conclusion deducible from these acts. They must have known that, by the enactment of the law which placed it in the power of the legal voters of any county in the State, or justice's precinct, or town, or city, by a majority vote to prohibit the sale of intoxicating drinks, except as in the statute permitted, they thus placed it within the power of such voters to cut off the revenues to be derived from that source within the given locality. And the only way that both laws can stand together is to hold that the general law remains in force wherever local option has not been adopted, and that where it has been adopted the general law becomes inoperative. The prospective operation of the Local Option Act, which authorized it to be put in force by subsequent act of the voters, must have been considered both by the framers of the Constitution and the Legislature, and we would not be warranted in the presumption that both these bodies overlooked the natural result of the principle embodied in the Constitution and the law upon the subject.

It may be contended that this view would render the burdens of taxation unequal; that by the operation of the Local Option Act the citizens of the counties or other localities adopting it by vote would thereby relieve themselves from exactions imposed upon other portions of the State, upon the idea that, by the Constitution, taxation must be equal and uniform throughout the State. The answer to this argument is, that the same Constitution which commends the one has made it obligatory upon the Legislature to provide for the other.

The two provisions of the Constitution are not repugnant to each other, and both may stand. Not so as to the laws

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relating to the tax upon retail liquor-dealers and local option. These laws are not only not in harmony, but are directly antagonistic, and so utterly repugnant to each other that both cannot be of force in the same locality at the same time.

Local option superseded, in the localities where it was adopted, all other laws on the subject, and expressly, as we have seen, repealed all laws in conflict with it. Rules of construction applicable to different acts passed at the same session of the Legislature, with reference to their different dates, do not apply here, for the reason above intimated, that under the Constitution, and the act passed in pursuance of its provisions, the law could be put in force at any time in the future, whenever the voters of any locality should deem proper.

Local option being in force in Williamson County at the time of the offence charged in the indictment, the accused could only have been prosecuted for violating its provisions. The indictment in this case charges no violation of the laws of the State in force in Williamson County at the time charged in the indictment, and the indictment should have been quashed; and this not having been done, the motion in arrest of judgment should have been sustained.

Because the indictment charges no offence known to the law in force in Williamson County at the time it was presented, the judgment of the County Court is reversed and this prosecution is dismissed.

Reversed and dismissed.

Syllabus.

MICHAEL TOONEY v. THE STATE.

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1. **NEW TRIAL.** — Application for new trial was properly denied when the newly discovered testimony upon which it was based was intended to impeach a witness.
2. **NEWLY DISCOVERED EVIDENCE.** — Application for new trial based upon newly discovered evidence, which, with due diligence, might have been had, was properly overruled. It is not sufficient that the application shows that the newly discovered evidence will reach the facts stated. It must show, also, the source of information.
3. **CONTINUANCE.** — When the statutory requirements are fully complied with in an application for a first continuance, it is a matter of right. Attachment for a witness living in the county cannot issue until a subpoena has been disregarded.
4. **SERVICE.** — An officer's return on a subpoena which comprises several witnesses should distinctly show the names of the witnesses served, and also the names of the witnesses *not* served. "Served by reading in hearing of," is not correct. The return should show service by "reading to" the witness.
5. **MALICE AFORETHOUGHT.** — The Penal Code gives no definition of "malice aforethought." The highest judicial tribunals, however, have established for it a signification more comprehensive than deliberate malevolence, enmity, ill-will, or revenge; and have so extended its meaning as to include all states of mind in which a homicide is committed without legal justification, extenuation, or excuse.
6. **EXPRESS AND IMPLIED MALICE.** — An actual and deliberate intention unlawfully to take the life of another, or to do him some great bodily harm, from which death might probably result, constitutes express malice. Implied malice is not a fact, but an inference or conclusion deducible from particular facts and circumstances, judicially ascertained.
7. **MURDER BY POISON.** — Article 608 of the Penal Code (Pasc. Dig., art. 2267) declares that "all murder committed by poison * * * is murder in the first degree." This is not to be understood as dispensing with the malice aforethought, which is the distinctive characteristic of all murder, and as indispensable to constitute murder by poison as by any other means. But a homicide committed with malice aforethought, and by means of poison, is by this provision of the Code made murder of the first degree, whether the malice be express or implied.
8. **SAME.** — Note in the opinion the collocation of the provisions of the Penal Code on offences committed by poison.
9. **SAME.** — Article 587 of the Penal Code (Pasc. Dig., art. 2198) defines the offence of mingling poison with any drink, food, or medicine, "*with intent to kill or injure any other person;*" and the next article enacts that if any

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one shall, "*with intent to injure*," cause another to inhale or swallow any substance injurious to health or to any of the bodily functions, or shall administer such substance "*with intent to kill*," he shall be punished, etc. The succeeding article provides that if, within one year, death ensues from such acts, "the offender shall be guilty of murder, and punished accordingly." *Held*, that a murder so committed would, by virtue of article 608, be murder of the first degree.

10. **SAME — CHARGE OF THE COURT.** — In the trial of an indictment for murder, based upon said articles 587 and 588, the charge to the jury should instruct them to determine whether or not the poison was "mingled or administered *with the intent to kill or injure*" the deceased.
11. **SAME.** — In like manner, in the trial of an indictment for murder based on said article 608, it is necessary that the charge to the jury should define or explain "malice aforethought."
12. **SAME.** — Indictment for murder by poison did not allege an attempt to rob. *Held*, error to instruct the jury to consider whether such was the intent, and thus submit to them an issue not presented in the indictment. To be legal, the charge must meet and be limited by the case made by the indictment.
13. **ACCOMPLICE'S TESTIMONY.** — The statute requires the corroboration of an accomplice to be by evidence tending to connect the defendant with "the offence committed," not with the offence *charged*.

APPEAL from the District Court of Tarrant. Tried below before the Hon. J. A. CARROLL.

On October 15, 1877, appellant, together with Joe Wright and Arch Johnson, was arrested and confined in the county jail of Tarrant County, and subsequently, on March 23, 1878, was indicted for the murder of W. P. Barton, on October 13, 1877, by administering poison in a glass of beer. Wright and Johnson escaped prosecution by turning State's evidence.

The *post-mortem* examination disclosed the presence, in the stomach of deceased, of small "reactions" of morphia and laudanum. Beyond this, and the evidence of the witnesses Wright and Johnson, the testimony for the State is inconsequential.

Wright, sworn, says that, on the day charged in the indictment, deceased came into the saloon of Johnson,

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where witness was tending bar, and, after drinking a glass of beer, went with appellant, at appellant's request, into the rear room of the saloon, which was then used for the purpose of gambling; that shortly afterwards the two were followed into the room by Arch Johnson, when the door leading into the bar-room was locked from the inside, or gambling-room; that in a half-hour appellant came out and asked witness to go and purchase for him 25 cents' worth of morphine, and in another half-hour asked witness to purchase for him 25 cents' worth of laudanum, both of which purchases witness made and gave to appellant, giving him at each time three glasses of beer; that, about three o'clock, witness saw deceased seated at the table in the gambling-room, seeming very drunk; that appellant remarked that "that man was very drunk," and he "wanted him out of there;" whereupon witness, with assistance, took deceased out.

On cross-examination, says that he bought the morphine and laudanum, knowing what appellant wanted it for, and that he assisted appellant in conveying deceased out of the saloon.

Johnson testified that he first saw the deceased, on the day charged in the indictment, drinking with the appellant in the middle, or gambling-room of witness's saloon. When witness entered, appellant asked him to "open up a game," which witness did, winning two several sums from the deceased. Witness thereupon left the saloon, and when he returned, shortly afterwards, he saw appellant receive from Wright two glasses of beer, and an ounce phial containing some dark liquid, which the appellant shook, turning from the witness. Witness then left the appellant and deceased alone in said gambling-room, and when witness returned, on the same day, the appellant told witness that he (appellant) and Wright had taken the deceased out back of the saloon, and that the police had taken deceased.

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Cross-examined, says that he has followed the avocation of a gambler, and always won, — that the “bank” always wins.

Witness Ham testified that he came into the saloon with deceased, and while standing at the bar, he saw a man come to the door of the gambling-room and beckon to the deceased, and that deceased went into the room with him. Witness thinks he can identify the appellant as the man who beckoned.

The testimony of the witnesses Thomas and Woody is identical. It is to the effect that they found the deceased lying on his back, about thirty yards in the rear of the saloon, evidently drunk, but protesting that he had been drugged, and dragged there, and was not drunk. They conveyed him to the calaboose, where he died during the night of the 13th. They discovered tracks leading from the back door of the saloon to where the deceased lay, as though made by dragging the deceased's feet along the ground. They saw the appellant about the saloon pretty much all that day. One of these witnesses testified that appellant has been generally regarded as a “capper” or “roper” for this saloon. By both of these witnesses it was testified that, when found, the deceased's pants were unbuttoned, and one pocket was turned wrong side out.

The appellant offered in evidence the first affidavit of Wright, taken before the coroner's inquest, in which he swore that he had never seen the deceased previous to the inquest, and followed this up by introducing his second affidavit, taken before the same inquest, — having been recalled. In this he stated that the deceased came into Johnson's saloon, where he was tending bar, with Ham and Patton, on the day charged in the indictment; that the three took a drink, when “English Tom” asked deceased to “come into the back room;” that they went in, sat down, and called for beer; that they drank for the half of

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an hour, when "English Tom" came to the window and asked witness to get him 20 cents' worth of morphine, not saying what he wanted with it, and that he (Wright) went and got it at the City Drug Store; that directly afterwards "English Tom" called for a couple of glasses of beer, and that he (Wright) put the beer on the ice-cooler, and "English Tom" came and got it, and called for more, and asked him (Wright) to go and get him 25 cents' worth of laudanum; that he went and got it for "English Tom," and gave him, with it, two more glasses of beer, and shortly afterwards "two whiskies," and then more beer; that about this time Johnson came through and went into the same room, saying he was going to feed his horses; is satisfied that Arch Johnson was in the room, for he saw him there, playing cards with the deceased and "English Tom," and he afterwards told him (Wright) that he had won \$33 from the deceased. This was about twelve o'clock. "English Tom" went out about one or two o'clock, and witness only saw the deceased in the room. About three o'clock "English Tom" came in the back way, the middle door being locked, and said he must have deceased out of there, as he was drunk; whereupon he ("English Tom") carried deceased out the back way. "English Tom" and Arch Johnson were the only persons in the room with deceased, and they remained in there about one hour and a-half. Arch Johnson was in the room with the deceased and "English Tom" when witness handed in the laudanum.

In his first testimony before the coroner's inquest, here given in evidence by appellant, A. B. Johnson swore that deceased looked like a man he saw in his saloon on the day charged in the indictment. Thought him drunk at the time. Saw him again that day, sitting down in the room adjoining the saloon, and left him sitting there when he went to dinner. Mr. Wright was the only person in the saloon when witness saw the deceased there. Next time he (Johnson) saw the

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deceased was in the calaboose. Saw deceased take a drink of beer in the saloon.

In his first testimony taken before the court, on the trial of a writ of *habeas corpus*, here given in evidence by the appellant, Johnson swore that he first saw deceased in his saloon on the day charged; that when he went to dinner, a few minutes later, he saw him in the room adjoining the saloon, sitting at a table with appellant, drinking beer. Witness saw the appellant have in his hand at the time a small phial, containing, he thought, a dark liquid. Appellant's back was turned to deceased. Witness did not stay in the room, but passed out, returning to the saloon about five o'clock. Saw Barton next day, dead. Saturday evening (13th) appellant told witness that he and Joe Wright had taken the deceased out of the back door, and the police had got him. Thought deceased was drunk when he (Johnson) saw him. In his cross-examination, Johnson denied having had a conversation with Thomas Watson, while in jail, in which he requested Watson to swear, on the final trial, that he (Watson) came to the back part of the house and saw appellant and deceased together in the middle room, and that he (Johnson) was not there, telling Watson that he (Johnson) was a citizen, and could benefit him (Watson), and that appellant was a stranger, and they could throw all the blame on him. Might have said to Watson that Wright was "kicking about this thing," and threatening to come back and testify against witness unless witness sent him money, but thinks he never made such remarks.

Thomas Watson was introduced by appellant, and swore that a conversation substantially as set out above did occur, and that the proposition embodied was made to him by Johnson.

William Ferguson and James Alford, witnesses for appellant, never heard Johnson's reputation for truth and veracity called in question.

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The jury found the appellant guilty of murder in the first degree. A new trial was asked by appellant, upon the ground, among others, of newly discovered evidence, the substance of which was as follows :

The application states that, though unable to procure the affidavit of Ben Patton, who is a resident of southern Texas, his testimony can be had by next term of court, when he will swear, in the event of a new trial, that he (Patton) met deceased and the State's witness Ham about nine o'clock A. M. on the day of the alleged poisoning, and went with them to the bank, and was with them until they went to Johnson's saloon, when he saw Johnson and deceased go into the gambling-room alone, and lock the door after them ; and that the appellant was not then in the saloon, nor did he, as alleged, enter the saloon or room with Ham and the deceased ; nor was he there from the time Ham, the deceased, and Patton entered the bank to the time they went to the saloon ; nor was he in the middle room, or about the saloon ; nor did he aid, assist, or administer poison to the deceased. All of which appellant says is true.

The affidavits of Elliston and Watson set out that they, with the appellant, and Ham, Wright, and Johnson, were arrested and confined in jail under this charge, but were subsequently released, and that in the event of a new trial they will swear that, while so confined in jail, in the course of a conversation conducted by Ham and these two witnesses jointly, Ham told them, at one and the same time, in the hearing of each other, that he (Ham) had never seen appellant before he saw him in jail, and that the man who beckoned the deceased into the gambling-room was a large, heavy-set man, and he (Ham) did not believe that appellant was the man. To all of which these affiants say they will testify in the event of a new trial, and that it is true.

The affidavit of Parker sets out that, on the morning of October 14, 1877, the witness Ham came to affiant's place

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of business and asked if affiant had seen the deceased that day, saying that he (Ham) was uneasy about deceased; that he had paid deceased \$800 in money, and that deceased's nephew had given deceased \$400 to keep for him. Ham further said to affiant that he had bought cattle from deceased, for which he had given his note for \$1,000, on which the \$800 was a payment, but which was not put on the note, as deceased did not have it with him. Ham further stated to affiant that the last he had seen of deceased was in the Fort Worth wagon-yard, on Saturday, October 13th, about three o'clock P. M., and that he (Ham) wanted deceased to stay there, but deceased would not do it; and he (Ham) was now uneasy about him, as he had not seen him since that time. All of which affiant says is true, and that so he will testify if a new trial is granted. The motion was overruled.

The charges of the court below, involved in the rulings of this court, are stated in the opinion.

Brown & Watts, and *McCart & Middleton*, for the appellant. The first error complained of by the defendant is the overruling of his motion for a continuance. The defendant was indicted for murder, on March 23, 1878, and served late that day with a copy of the indictment; and on the 25th day of said month the defendant applied for subpoena for the witnesses Mrs. Jones, J. W. Ralhkey, Thomas Mahoney, and Frank Kinch, with other witnesses who were served; the above witnesses not found in Tarrant County. The defendant states, in his affidavit, that all of said witnesses were residents of said county of Tarrant; that the 24th day of said month was the Sabbath. The materiality of the testimony of the witnesses Mrs. Jones, Ralhkey, Mahoney, and Kinch, we think, cannot be questioned, as set forth in defendant's affidavit, especially when we consider the testimony against him. Then, the only

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question that presents itself is, Did the defendant show due diligence? The defendant shows that at the time he was served with a copy of the indictment he was confined in the county jail of Tarrant County; that as soon as a subpoena could issue he applied for the proper process, a subpoena for his witnesses; and that the same was returned into court on the same day, March 25, 1878, the above-named witnesses not found.

In 35 Texas, page 359 (*Landers v. The State*), is a case very similar to the one at bar in regard to the time of indictment, application for process, and trial. Indicted October 11, 1871, process issued on October 12th, and tried on October 19th. In the case at bar, defendant was indicted on March 23d, process applied for on March 25th, and motion for continuance overruled on April 3, 1878, and defendant on the same day went into trial. In the case of *Henderson v. The State*, 22 Texas, 595, where the motion for a continuance did not state the residence of the witness, but where it showed that the time of the issuing of process and trial of cause was similar to the one at bar, the court say that it was not sufficient for a second application is too clear for comment. From the language, we may reasonably infer that it would have been sufficient for the first application, although the residence of the witness was not stated in the motion.

We think the application in the case at bar complied with the law; that the testimony was material; that we used due diligence, and complied with all the requisites for a motion for the first continuance.

The court erred, in its second and fourth charges to the jury, in charging anything about robbery, the indictment not charging the defendant with giving the poison for the purpose of robbing the deceased; and there is no evidence to that effect.

The court erred in giving the jury the eighth instruction.

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The court, in this instruction, charged the jury that, to warrant a conviction on the testimony of an accomplice, said testimony must be corroborated in some material point tending to connect defendant with the offence charged.

It should have gone a step further, and told the jury that the corroboration is not sufficient if it merely shows the commission of the offence. Under the instruction as given, the jury would be warranted in finding the defendant guilty upon the evidence of the accomplice solely, although there was no corroborating evidence to the commission of the crime, provided the accomplices were corroborated as to some point tending to connect the defendant with the offence charged. We understand the law to be that there must be corroborating evidence both as to the *corpus delicti* and that the defendant committed the offence; and, if such is the law, it would evidently follow that an instruction would be bad, should it require the jury to find a defendant guilty upon corroborating evidence as to one of these points only.

Again, the instruction is bad in this: that the jury are warranted in finding the defendant guilty upon the testimony of an accomplice, if said testimony is corroborated upon any material point tending to connect the defendant with the offence *charged*. It should have, in the place of the word “charged,” used the word “committed.”

There may be, and often is, a considerable difference between the offence “committed” and the offence “charged.”

The court charged the jury in the tenth and last instruction as follows:

“You are the exclusive judges of the credibility of the witnesses.”

We insist, under the facts in this case, first, that said instruction is not the law; and, secondly, that it was misleading.

The seventh instruction tells the jury that they are not

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warranted in convicting the defendant upon the uncorroborated evidence of an accomplice. The tenth instruction, in clear, succinct, and forcible language, tells them they are the exclusive judges of the credibility of the witnesses. If this is the law, then, the jury being the exclusive judges of the credibility of all witnesses, they could, under the charge (contrary to the law), find the defendant guilty upon the evidence of an accomplice solely. Now, which instruction shall they follow? Who is able to say which instruction they were guided by? Are we justified in saying, when a man's life is at stake, that they were guided by the seventh instruction? The tenth instruction, being the last, and short, clear, and forcible, would make more impression upon the minds of the jury than an instruction given in the middle of the judge's charges.

The seventh and tenth instructions are diametrically opposed to each other. Both cannot stand. If the seventh instruction was the law in this case (and there can be no doubt of that, under our statute), the tenth instruction is not and cannot be the law in this case. It was error to give it to the jury, and the defendant's rights have been prejudiced thereby.

In some cases the jury are the exclusive judges of the facts proved, and of the weight to be given to the testimony; but in the case at bar, our statute, in positive language, says the jury shall not be the exclusive judges of the credibility of the witnesses. Article 3118 says: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offence committed; and the corroboration is not sufficient if it merely shows the commission of the offence."

Article 3108 says: "The jury in all cases are the exclusive judges of the facts proved and the weight to be given to the testimony, except when it is provided by law that

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proof of any particular fact is to be taken as either presumptive or conclusive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence.”

In *Coleman v. The State*, 44 Texas, 111, the court says: “However much a jury may be disposed to credit the accomplice, the defendant cannot be convicted unless the evidence of the accomplice be confirmed in some material matter tending to show the defendant’s guilt.”

This tenth instruction, tested by articles 3108 and 3118, and a great many decisions of our Supreme Court and the Court of Appeals, is bad law.

It is well settled law that the jury are the exclusive judges of the weight to be given to the witnesses, with the exceptions stated in article 3108.

The evidence coming from an accomplice is so corrupt, so unreliable, and, in the eye of the law, so infamous, that our statute says that jurors shall not credit accomplices; they shall not be the exclusive judges of the weight to be given to their testimony; and the decisions of our Supreme Court have, time and again, affirmed this doctrine.

The tenth instruction wipes out articles 3108 and 3118, and all the decisions of our Supreme Court upon the subject of accomplices.

In *Brown v. The State*, 23 Texas, 200, the court say: “The jury are the exclusive judges of the weight to be given to the evidence, unless a certain degree of weight is attached to a certain species of evidence, as that a conviction cannot be sustained upon the uncorroborated evidence of an accomplice; and it is the duty of the court to instruct the jury upon their legal presumption and degree of weight.”

In *Foxdale v. The State*, 9 Humph. 411, the court say: “If the testimony in a capital case be not free from doubt, and there is reason to suppose that the jury have been misled by the court in charging them as to the evidence, a

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new trial will be granted, notwithstanding the charge was correct in point of law.”

When instructions are contradictory there should be a new trial. *The People v. Anderson*, 44 Cal. 65; *Spevey v. The State*, 26 Ala. 90.

An erroneous instruction is not cured by a correct instruction upon the same point. *Mackey v. The People*, 2 Col. 13; *Bradley v. The State*, 31 Ind. 492; *Kingen v. The State*, 45 Ind. 519.

It is the bounden duty of the judge, under our statute, to deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; and, moreover, to state plainly the law of the case. *Pasc. Dig.*, arts. 3059, 3060; 5 Gray, 80.

We ask your honors, Has the law of the case been plainly stated to the jury?

A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offence committed; and the corroboration is not sufficient if it merely shows the commission of the offence. *Pasc. Dig.*, art. 3118.

Accomplices are considered, in law, odious; they are ranked under the class of persons infamous. The reason is, that such a person is morally too corrupt to be trusted to testify, —so reckless of the distinction between truth and falsehood, and insensible to the restraining influence of an oath, as to render it impossible that he will speak the truth at all. Of such a person Chief Baron Gilbert remarks that the credit of his oath is overbalanced by the stain of his iniquity.

At the common law, the degree of credit which ought to be given to an accomplice was a matter exclusively within the province of the jury. They could convict upon the evidence of an accomplice without confirmation; but this law was softened by the judges, and it became the practice

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not to convict a person upon the sole and uncorroborated testimony of an accomplice.

As to the manner and extent of the corroboration, learned judges are not perfectly agreed. But the great weight of authorities hold that the corroboration must be as to material matters, requiring not only confirmatory evidence as to the *corpus delicti*, but also that the prisoner committed the crime.

The source of this evidence is so corrupt that it is always looked upon with suspicion and doubt, and is deemed unsafe to rely upon without confirmation. Therefore our statute requires, not only corroborating evidence as to a crime having been committed, but that the prisoner committed said crime. Pasc. Dig., art. 3118.

Two or more accomplices, produced as witnesses, are not deemed to corroborate each other; but the same rule is applied, and the same confirmation required, as if there were but one. *Johnson v. The State*, 4 Greene (Iowa), 65; 1 Greenl. on Ev. 381.

Proving by other witnesses that robbery was in fact committed in the mode in which an accomplice stated it to have been done is not such confirmation of him as is required to warrant a conviction on his evidence. It is no confirmation at all, said the judge, as every one will give credit to a man who avers himself a felon for at least knowing how the felony was committed. *Rex v. Webb*, 6 Car. & P. 595; *Rex v. Wilkes*, 7 Car. & P. 272.

New trials have been refused when the verdict was obtained on the uncorroborated testimony of an accomplice, but if a conviction be had on the testimony of an accomplice whose credibility is otherwise impeached, a new trial should always be granted. 1 Whart. Cr. Law, 7th ed., sec. 785, and cases cited.

The court erred in refusing to grant a new trial on account of newly discovered testimony. While we are

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aware that it would not be sufficient cause for a new trial to contradict or impeach a witness, yet in this case the newly discovered testimony of Thomas Elliston, Thomas Watson, and John F. Parker all go to show that the witness for the State, Joel E. Ham, upon whose testimony the State must rely as corroborating the accomplices, Wright and Johnson, was himself an accomplice, and in fact the moving spirit.

In the case of *G. F. M. Company v. Mathews*, 5 N. H., 574, the court held that a new trial should be granted, where one of the witnesses of the party in whose favor the verdict was had been convicted of perjury in the cause, on his own confession. We must confess that we cannot see that there is any difference between a confessed perjurer and one proved to be such; and if Joel E. Ham be an accomplice in this case, where is the testimony to corroborate the accomplices Wright and Johnson? Certainly the testimony of Woody and Thomas does not tend to connect this defendant with the killing of Barton.

But, to return to the testimony newly discovered: we think that said testimony is material, and that the same would probably change the result of the trial, and that the same is not cumulative. While circumstances did point to Joel E. Ham as an accomplice or accessory, there was no direct testimony to that fact. Joel E. Ham and deceased were strangers in the city of Fort Worth; came there for the purpose of "getting grub," in his own language; yet after the death of deceased he left the city, leaving his fellow-traveller unburied and in the hands of the coroner. He made no effort to find out who murdered his friend; did not appear before the coroner until forced to do so by arrest. We do not find him hunting for his friend after he was missing. Ham was the only person that knew that the deceased was possessed of money; and when asked by a nephew of deceased if he did not owe the deceased money, Ham falsely

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stated that he did not. With all these circumstances tending to show that Joel E. Ham was an accessory to the murder, we ask the court if the newly discovered testimony is not material, and that the same would probably affect the issue of this cause. We respectfully refer the court to the affidavits of Wilson, Watson, and Parker.

Johnson and Wright testified only on condition that they were not to be prosecuted. The record shows conclusively that they were accomplices. It should not have been left with the jury to find or say whether or not they were accomplices. The jury might say that Johnson and Wright, or one or the other of them, was not an accomplice, and hence they would convict upon his or their evidence, without any corroborating evidence. The State being estopped from denying that Wright and Johnson were accomplices, it was error for the court to leave it for the jury to find. The verdict of the jury was contrary to the law and the evidence. The State witnesses in the case are Johnson and Wright, and upon the testimony of these two men the defendant is convicted of murder in the first degree.

We desire briefly to picture the two men, as they are shown by the record. If your honors will simply read the testimony of these two men, as shown in the statement of the facts and their testimony before the coroner's inquest, and upon the *habeas corpus* trial, you will see that they confess themselves to be bad and dangerous men, and unworthy of belief. The best and the strongest argument we can make upon the evidence of these two men is to ask your honors to first read the testimony of Wright and Johnson taken before the coroner's inquest, and their evidence in the trial of the case. If they told the truth then, they lied most foully now; and if the testimony now is true, they lied most basely at the coroner's inquest. So, they perjured themselves in either one trial or the other; and who can say, with any degree of satisfaction, this is the truth and this is

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the falsehood? The truth is, they are liars, and the truth is not in them.

George McCormick, Assistant Attorney-General, for the State. The motion for new trial was properly overruled.

1. Because the evidence sought, as appears from the affidavits of the three witnesses, attached to the motion, was intended to impeach the witness Ham, by showing that he had made other and different statements than those made on the trial of the case.

2. Because the application does not show what diligence the accused used, if any, to find out the facts he says he can now prove by the witness Patton, whose residence he does not know. Nor does the application show how affiant is informed, or upon what he bases his statement, that Patton would testify as he states; and because he desires the testimony of Patton to impeach the testimony of other witnesses, and show an *alibi*.

Upon these questions see *Love v. The State*, 3 Ct. App. 501, and authorities cited.

The record shows that the facts of this case had twice been under investigation before the courts before the trial that resulted in this conviction, and that, therefore, appellant must have known the necessity of procuring evidence for his defence.

That he was confined in jail will not excuse the use of diligence in procuring the attendance of witnesses. *Cox v. The State*, 43 Texas, 101.

It is further shown that the witnesses resided in Tarrant County, and no diligence was used to secure their attendance except the issuance of a subpoena, which was issued and returned on the same day. To whom issued or delivered, or by whom returned, does not appear.

Again, it is submitted that the mere issuance of the subpoena was not sufficient, when the facts, as in this case, show it had been disobeyed.

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Article 2907 requires an attachment when the subpoena has been disobeyed, and article 2914 declares when a subpoena is to be considered as disobeyed.

The application does not show why an attachment was not procured for the defaulting witnesses, as was clearly the duty of appellant to have done unless the witnesses were present on the day set apart for taking up the criminal docket, or any day subsequent thereto, and before the disposition of this case.

Although the witnesses had been subpoenaed, yet if they did not attend the court before the case was called, it was the duty of the prisoner to have had them attached; otherwise, he has not used the diligence required by law. Pasc. Dig., arts. 2914–2987.

It is further submitted that, to bring the application in question within the requirement of the statute, it appearing that the witnesses were not present when the case was called for trial, it should have been shown that the witnesses had been present, as prescribed in Paschal's Digest, art. 2914.

The witnesses having failed to appear, it was the duty of the defendant to have had an attachment issued forthwith for them; and, having failed to use the power of the courts in enforcing their attendance, he is not entitled to a new trial by reason of their absence. Pasc. Dig., art. 2907.

The Code (Pasc. Dig., art. 2198) provides that "if any person shall mingle any poison, or any other noxious potion or substance, with any drink, food, or medicine, with intent to kill or injure any other person," etc.

And the succeeding article declares that if, by reason of such offence, the death of a person is caused, such offender shall be deemed guilty of murder, etc.

Now it is submitted that, the Code having declared (Pasc. Dig., art. 2267) that all murder committed by poison is murder in the first degree, the intent to kill or murder need not exist in the mind of the slayer at the time he

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so administers the poisonous substance. The fact being shown that the poisonous potion was administered with intent to kill, or injure any of the functions of the body, death resulting therefrom is conclusive of the grade of the crime.

In the case at bar it may be insisted (following the rule laid down by this court in *Stapp v. The State*, 3 Texas Ct. App. 138, where it was held that the proof did not show that the wound given by the prisoner was necessarily fatal, and, therefore, he was rightly convicted of the offence of assault with intent to murder) that the poison administered by the prisoner in this case was either not given with intent to kill or injure, or was not, in fact, necessarily fatal to the deceased; and that, therefore, the court should have given in charge to the jury the law punishing the administering of poisonous and injurious potions.

That is, if the evidence adduced in this case could have raised the question whether the deceased died from the effects of the poison, then the law permitting a punishment for the less offence should have been given to the jury; and that the prisoner should have had the benefit of such doubt, and his conviction not to have been made to entirely depend upon his having administered the poisonous drug.

In reply to this, I submit that murder committed with poison constitutes a distinct class of crime; it is an offence of such great enormity, so readily committed, and so difficult of detection, that our law-makers intended to prevent such crimes by placing the most severe punishment of which the law was capable upon those who would use poison to injure. Therefore they have provided that when poison is administered *at all*, with intent to injure, and death results thereby, *such killing* is murder, and such murder is murder of the first degree.

Again, it having been shown in the case at bar that the poison was administered with intent to injure the deceased,

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it is no defence that the poisoner did not intend to murder. For the statute declares such administering with such intent, of itself, to be murder; and the general principle of law being, if among all the motives leading to a particular intentional illegal act, one motive is to violate the law, this is sufficient to lend to the act the essential evil intent, no matter how strong may be other concurrent intents. Whart. Cr. Law, 561, sec. 670; Pasc. Dig., art. 1655.

In this case, if the intent with which the poison was given was illegal, and death resulted thereby, such offence is murder; for it must be presumed that the poisoner intended the natural and probable consequence of his acts.

The only question, as an examination of the record will show, arises upon the evidence, and particularly that portion of the evidence corroborating the testimony of the accomplices, and tending, otherwise than by their testimony, to connect the prisoner with the commission of the offence.

The statement of facts shows that the witnesses Johnson and Wright are principals with defendant in the crime charged. Indeed, it is to be regretted that such infamous characters as they should by any means escape the penalty for their crimes. Not only from the evidence does it appear that these men are murderers, but also that they have been guilty of wilful and corrupt perjury.

Notwithstanding all this, the weight and credit to which their testimony is entitled was a matter entirely for the jury, and this court cannot interfere if they were corroborated by facts tending to connect the prisoner with the commission of the offence charged.

Now, how and to what extent were they corroborated?

1. The deceased was found lying near the back door of the saloon, under the influence of a poisonous drug, and the condition of things showed he had been dragged there from the saloon, and thrown down upon the ground.

2. The testimony of the witness Thomas, the policeman,

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shows that after he had put the deceased in the lock-up, he met the prisoner, and asked him if he knew where Tom Watson was, and that he answered he did not; and that afterwards the prisoner went to the witness and asked him what he wanted with Watson, and when told, said: "If that is all you want, I can tell you; I thought you wanted him about the man you put in the *calaboose*."

Why did the prisoner feel such an interest in the man who was put in the calaboose, and why seek to mislead the officer about Watson, who, it is shown, participated in the murder?

3. The testimony of the officer shows that he had "always seen the prisoner about the saloon where the murder was committed," and that he was what is called, in common parlance, a "decoy duck," used to induce men to enter this saloon.

4. The prisoner was seen in the saloon several times on the day of the murder.

5. The witness Ham says that defendant is the man who beckoned the deceased into the room where he was afterwards drugged and robbed. He described the appearance of defendant at the time; and this fact is corroborated by other witnesses.

It is, therefore, respectfully submitted that these facts and circumstances tend, when taken in connection with the other evidence in the case, to connect the prisoner with the commission of the offence. See the able opinion of this court in *Jones v. The State*, 3 Texas Ct. App. 575, and the authorities therein cited.

That the deceased died from the effects of the poison so administered is abundantly shown, both by the circumstances of his death, his physical condition soon after it was taken, and the testimony of the medical witnesses. Mr. Greenleaf says: "It is sufficient if the jury are satisfied, from all the circumstances, and beyond a reasonable doubt, that the death was caused by poison, administered by the prisoner."

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And this is the rule, although the particular kind administered is not shown, nor that a sufficient quantity to cause death was shown to have been found in the body of the deceased. 3 Greenl. on Ev., sec. 135.

Again, although the presence of poison in the stomach does not prove the *corpus delicti*, yet when, as in this case, the inference is strong, and the concurrent evidence of the symptoms of the disease of such a nature as to make any other presumption less probable, the offence is sufficiently established. Elwell's Med. Jur. 447.

Roscoe lays down the correct rule, as taken from the opinions in a number of English cases, that, although medical men in many cases cannot positively affirm that death resulted from poison, the accumulative strength of circumstantial evidence may be such as to warrant a conviction; since more cannot be required than that the charge should be rendered highly credible from a variety of detached points of proof, and that, supposing poison to have been employed, stronger demonstrations could not reasonably have been expected. Roscoe's Cr. Ev. 658.

WHITE, J. The indictment charges the appellant with the murder, by poison, of one William P. Barton, in the county of Tarrant, on October 14, 1877. Morphine and laudanum were the poisons alleged to have been used in the perpetration of the crime, and they were administered by being mixed and mingled in beer which was drunk by the deceased. The indictment was returned into court on March 23, 1878; a copy was served upon defendant on the same day, late in the evening, and defendant was put upon his trial April 3, 1878. Defendant's conviction for murder in the first degree was the result of the trial, the punishment being death by hanging.

Three prominent questions present themselves in the bills of exception, and they relate, —

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1. To the overruling of defendant's application for a continuance.

2. To the charge of the court.

3. The overruling of defendant's motion for a new trial.

With regard to the last, which we will first dispose of, in so far as it was based upon newly discovered evidence, the application was, in our opinion, insufficient. The main object for which the newly discovered testimony was sought was to impeach one of the State's witnesses. The rule is, a new trial will not be granted because of evidence to impeach a witness. *Love v. The State*, 3 Texas Ct. App. 501 ; *Thompson v. The State*, 2 Texas Ct. App. 289.

So far as most of the witnesses named in the motion are concerned, the facts stated in the affidavit of accused, and the supporting affidavits of said witnesses, show that by the use of reasonable diligence the testimony might have been known to, and been had by, the defendant. Another rule is, that a new trial will not be granted on account of new evidence, when by reasonable diligence it could have been previously obtained. *Linnard v. Crossland*, 10 Texas, 465 ; *Harmon v. The State*, 3 Texas Ct. App. 51.

With regard to the witness Patton, whose testimony is also claimed as newly discovered, it is deposed by defendant that Patton will swear to the facts stated ; but he does not state how he knows, or who informed him that he would do so. He should have stated the source of his information (*Brown v. The State*, 23 Texas, 195), and thereby have afforded the court an opportunity, if it desired to do so, to inquire into its reliability. For these reasons the court did not err in overruling the motion for a new trial on the ground of newly discovered evidence.

Defendant was put upon his trial on April 3, 1878, ten days after the return of the indictment. His application for a continuance states that on the 25th instant his subpoena for his witnesses, all of whom he swears reside in Tarrant

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County, was returned, “with the following indorsement thereon: ‘Executed on the 25th day of March, 1878, by reading in hearing of the within named witnesses — Mrs. Jones, J. W. Rahlkey, J. Brewer, Thomas Mahoney, Frank Kinch not found in county.’ ”

It is contended for the State that none of these witnesses named were served, or found in the county. If this position be correct, it follows that due diligence is wanting to support the application for a continuance, which is made for these witnesses; because it would then appear that, after the return “not found,” eight days at least had elapsed before trial, and no additional steps were taken by defendant to secure their attendance. If these identical witnesses were served, or any one of them, then due diligence had been exercised, and the application should have been granted, because it was the first, and came fully up to the requirements of the statute. Pasc. Dig., art. 2987; *Dinkins v. The State*, 42 Texas, 250; *Swofford v. The State*, 3 Texas Ct. App. 76.

When a witness residing in the county has been served with a subpoena, no other process can issue for his attendance until he has failed to obey the subpoena; until this occurs an attachment cannot issue. Pasc. Dig., arts. 2907–2914. “The amendment to article 435 of the Penal Code, passed May 27, 1873 [Acts 1873, p. 103], does not affect the provisions of article 436; and the amendments to articles 379 and 380 of the Code of Criminal Procedure, contained in 2 Paschal’s Digest, articles 6601 and 6602, relate solely to enforcing the attendance of witnesses before the grand juries.” *Austin v. The State*, 42 Texas, 345.

There is nothing in the record save the return, as copied above, to guide us in solving this question. That does not inform us that there were other witnesses named in the subpoena than those named in the return; nor does the punctuation of the language used in the return throw light upon

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the subject. If we presume that there were other witnesses named in the subpoena, and that they were the ones served, whilst none of those named in the return were, in fact, served, then we might indulge a conclusion contrary to the existence of the facts, and fatally injurious to the rights of a defendant on trial for his life. On the contrary, is the presumption not more reasonable and just, to say nothing of its humanity, that a party about to be placed upon trial for his life, finding that his material witnesses residing in the county had not been summoned, would have procured other process for them, which, to say the least of it, would have secured a continuance of his trial, if it should fail to procure their attendance? Pasc. Dig., arts. 1435, 2987. An officer's return on process placed in his hands for execution should not be indefinite. Such doubts could be easily obviated by showing in the return the names of the witnesses served, and also the names of the witnesses not served. The return is liable to another objection, viz.: it does not show that the subpoena was "*served by being read to the witness.*" Pasc. Dig., art. 1434.

Before proceeding to inquire into the correctness of the charge of the court, we propose to examine our statutes with reference to "*murder by poison,*" since, so far as we remember, they have never heretofore been directly construed in regard to that offence. And, first, we will consider the crime as part of and in connection with our general statute defining murder. The language of this statute is: "*Every person, with sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offence to negligent homicide or manslaughter, or which will excuse or justify the homicide.*" Pasc. Dig., art. 2266.

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“ All murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in the attempt at perpetration, of arson, rape, robbery, or burglary, is murder in the first degree ; and all murder not of the first degree is murder of the second degree.” Pasc. Dig., art. 2267.

Here we see that the language used is “ all *murder committed* by poison,” “ is murder in the first degree.” Not all homicide or killing, because all killing is not murder, nor is all unlawful killing murder ; but the offence committed must be *murder*, — murder in its legal, technical sense, — which is made distinguishable from every other species of homicide by being an unlawful killing, actuated by “ malice aforethought, either express or implied.” This essential ingredient, — “ malice aforethought,” — is as necessary to constitute the crime of murder by poison as it is to constitute murder committed by any other means. Our Penal Code does not define the meaning of the expression, “ malice aforethought.” It has, however, been fully defined in the light of common-law authority by our former chief justice, in the celebrated case of *McCoy v. The State*, and which definition is now accepted throughout this State as eminently correct.

He says : “ In every indictment for murder, the prisoner is charged with having, with malice aforethought, killed the deceased. The proof to sustain this charge under the law may or may not exhibit deliberate malevolence in the mind of the prisoner towards the person killed, though that may be the literal import of the charge, in the ordinary acceptance of the terms used. Hence malice aforethought, when attempted to be defined, has been necessarily given a more comprehensive meaning than enmity, or ill-will, or revenge ; and has been extended so as to include all those states of the mind under which the killing of a person takes place without any cause which will, in law, justify, excuse, or extenuate the homicide.” 25 Texas, 33, citing *Rex v.*

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Harvey, 2 Barn. & Cress. 268 ; 1 Hawk. P. C. 95 ; 1 Russ. on Cr. 482 ; Penal Code, art. 607 (Pasc. Dig., art. 2266).

Again, he says: "Express malice is when one, with a sedate, deliberate mind, and formed design, doth kill another.

* * * The design formed must be to kill the deceased, or inflict some serious bodily harm upon him. This would indicate that the malevolence must be directed towards the deceased as its object. * * * This design is not confined to an intention to take away the life of the deceased, but includes the intent to do any unlawful act which may probably end in depriving the party of life. Roscoe's Cr. Ev. 707 ; Stark. on Cr. Pl. 711. This specific malevolence towards the person killed may be embraced in such utter and reckless disregard of life as shows a man to be an enemy to all mankind,—as, when a man resolves to kill the next man he meets, and does kill him ; or shoots into a crowd wantonly, not knowing whom he may kill. 4 Bla. Com. 200." *McCoy v. The State*, 25 Texas, 33.

Malice express consists in the actual and deliberate intention unlawfully to take away the life of another, or do him great bodily harm. Implied or constructive malice is not a fact, but is an inference or conclusion founded upon the particular facts and circumstances of the case as they are ascertained to exist. *McCoy v. The State*, 25 Texas, 33 ; 2 Stark. on Cr. Pl. 711.

Murder in the first degree, then, is constituted when the specific intention is to take the life of the deceased, or to do him some serious bodily harm, the doing of which subsequently results in his death. Without such intention "malice aforethought" is wanting, and if death ensues, whether by poison or other means, it is not murder in the first degree. But if malice aforethought is shown to exist, and the means used be poison, then the killing becomes, under our law, *ipso facto* murder in the first degree. In other words, when murder is committed by poison, the atro-

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cious enormity and heinousness of the crime is such that our law-givers have wisely provided it shall consist of no degrees, and shall merit the highest punishment known to the law. We are aware that the doctrine thus declared is not the uniform rule as it obtains in, perhaps, the majority of the American States. This contrariety of decision, however, arises from the difference in the terms of their statutes from those used in ours.

Turning, now, from the general statute of murder, we find that we have a further and additional statute declaring other crimes growing out of the administration of poisonous and injurious potions, and which may in certain contingencies become murder. These statutes read as follows: "If any person shall mingle any poison, or any other noxious potion or substance, with any drink, food, or medicine, with intent to kill or injure any other person, or shall wilfully poison any spring, well, cistern, or reservoir of water with such intent, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years." Pasc. Dig., art. 2198.

"Art. 2199. If any person shall, with intent to injure, cause another person to inhale or swallow any substance injurious to health, or any of the functions of the body, or if such substance was administered with intent to kill, he shall be punished by confinement in the penitentiary not less than two nor more than five years.

"Art. 2200. If, by reason of the commission of the offences named in the two preceding articles, the death of a person be caused within one year, the offender shall be guilty of murder, and punished accordingly."

Evidently, the object of this statute was to reach a class of cases about which doubts might arise when the general statute of murder was sought to be applied to them. Such doubts were more imaginary than real, in our construction of both statutes. It is to be noted that under these latter

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statutes "the intent to kill," or "the intent to injure," are made to stand in lieu of and must be proven just as "malice aforethought" under the general law, which, as we have seen, when explained, means nothing more nor less than the taking of life with intention to do so, or when death results from an intention to do serious bodily harm. In either case, and under this latter, as under the former statute, the malicious intent and its proof are not only the same, but are also the very gist of the offence. So utterly revolting to every sense of humanity is the use of poisons as means of injury to and for the destruction of human life, because of the cool, calculating fiendishness, the deliberate craftiness with which they are administered, and the unsuspecting confidence with which they are necessarily taken by the innocent victim, that the law, in its efforts to suppress it entirely as one of the foulest of all crimes, denounces no half-way penalties against it after it has accomplished the destruction of a reasonable creature in being. Under these last statutes, if death ensues within one year it is murder; and it is murder in the first degree under the express terms of our statutes (art. 2267), because committed by poison.

In the case at bar the indictment was evidently so framed, and properly, we think, in view of the facts, to fit the provisions of article 2200, above quoted. It is good under either or both statutes.

The view of the case taken by the learned judge, as developed in his charge to the jury, was that the case made by the pleadings and evidence was one coming solely under our general statute of murder, *supra*. Under either statute this charge is insufficient. Under the first (arts. 2266, 2267), because it did not explain "malice aforethought," which is the essential ingredient of murder by poison, as of all other murder; the only difference being that in murder by poison the crime is incapable of degrees, and, consequently, is not

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subjected to the test or distinction between “express” or “implied malice,” ordinarily used to characterize the degree of murder, but would be murder of the first degree in any event, no matter what kind of malice might be shown. Under the other statute (art. 2200) the charge would also be insufficient, in not submitting to the jury, as the essential facts to be ascertained and determined, whether or not the poison was administered “with intent to take life,” or “to injure the health or functions of the body” of the person killed.

Again, the charge was error in that it submitted to the jury an issue not made by the indictment. We find this language used in paragraph 2: “All murder committed by poison, and all murder committed *in the perpetration, or attempted perpetration of robbery*, is murder in the first degree.” And also, in paragraph 4, the further instruction: “If you find from the testimony that the said poison was so given to the said Barton by the said defendant, either alone or acting with other persons, with the intent on the part of defendant to kill *or rob* the said Barton, then you will find the defendant guilty of murder in the first degree.”

In the indictment it is nowhere alleged that the murder was committed in the perpetration of, or attempt to perpetrate, robbery. A charge, to be legal,—that is, to “present the law applicable to the case,”—must meet and be limited by the case as set forth and pleaded in the indictment. The charge must conform to and correspond with the allegations. To go outside of and beyond them, in submitting other issues, is not only calculated to mislead the jury, but also calculated to injure the rights of the defendant, by making them depend upon matters he could not be prepared to meet, because he was not notified that they would be urged against him. *Coney*

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v. *The State*, 43 Texas, 414; *Kouns v. The State*, 3 Texas Ct. App. 13; *Ferguson v. The State*, 4 Texas Ct. App. 156.

The seventh and eighth paragraphs of the charge presented the law with regard to accomplices correctly, as the same is provided in article 3118, Paschal's Digest, with the exception that, in paragraph 8, the expression, "connect the defendant with the offence *charged*," instead of "with the offence *committed*," is twice used. The statute reads: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offence committed; and the corroboration is not sufficient if it merely shows the commission of the offence." Art. 3118. See the following cases, in which this article has been discussed and construed: *Dill v. The State*, 1 Texas Ct. App. 278; *Irvin v. The State*, 1 Texas Ct. App. 301; *Kelly v. The State*, 1 Texas Ct. App. 628; *Nourse v. The State*, 2 Texas Ct. App. 304; *Davis v. The State*, 2 Texas Ct. App. 588; *Gillian v. The State*, 3 Texas Ct. App. 132; *Welsh v. The State*, 3 Texas Ct. App. 413; *Jones v. The State*, 3 Texas Ct. App. 575; *Barrara v. The State*, 43 Texas, 260; *Roach v. The State*, 4 Texas Ct. App. 46; *Jackson v. The State*, 4 Texas Ct. App. 292, 293; and other cases decided at the present term by this court.

It is unnecessary that we should discuss any of the other errors complained of, as none are considered of vital moment. Nor will we discuss the facts proven, or character of the evidence as adduced on the trial and set out in the statement in the record.

For the reasons we have shown, it appearing that the charge of the court did not present the law applicable to the case, the judgment rendered below is reversed and the cause remanded.

Reversed and remanded.

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JOHN CARLSON v. THE STATE.

1. **PRACTICE IN THIS COURT.**—It is a settled rule that, in the absence of a statement of the facts in evidence before the court and jury, this court, on appeal, will only consider whether the indictment sustains the charge and the finding of the jury. See *Longley v. The State*, 8 Texas Ct. App. 611, and cases there cited.
2. **MURDER — EVIDENCE.**—By bill of exceptions it appears that the defence in a murder case attempted to prove that the defendant, who, after the killing, in 1866, had gone to Missouri, sent word, in 1867 or 1868, to the private prosecutor in this case that he (defendant) was living openly at C., in said State, and was anxious to return and stand his trial, but was too poor; which evidence was objected to by the State as irrelevant and immaterial. *Held*, that the court below did not err in sustaining the objection.
3. **SAME.**—A second bill of exceptions complains of the exclusion by the court of testimony sought, on cross-examination of the prosecuting witness, for the purpose of showing the *animus* of the witness. Its purport was that the witness had reliable information of the whereabouts of defendant for several years before he had the defendant brought back upon requisition, which was not done until several witnesses upon whom the defendant relied for his defence were dead. *Held*, that this testimony was properly excluded as immaterial. If the defendant chose to remain away until his witnesses died, instead of returning and placing himself under the protection of the law, he did so at his peril.
4. **SAME.**—A third bill of exceptions complains of the exclusion by the court of evidence on the *animus* of the prosecuting witness, tending to show (1) that he was informed, in 1869, that defendant was living openly at C., in the State of Missouri; (2) that the defendant sent word to said witness that he (defendant) was anxious to come back and stand his trial, but was too poor to pay his expenses; and (3) that the residence of the defendant was generally known in the county of the *forum* for many years before he was arrested. This bill of exceptions also shows that the prosecuting witness was a brother of the deceased. *Held*, that such testimony was properly excluded for irrelevancy and immateriality.

APPEAL from the District Court of Williamson. Tried below before the Hon. A. S. WALKER, Special Judge.

The appellant was charged by indictment, filed November 1, 1866, with the murder of August Nelson, in Williamson County, on May 17, 1866.

Appellant was put upon his trial in Williamson County

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on September 16, 1878, found guilty of murder in the second degree, and sentenced to nine years' confinement in the penitentiary, assessed as his punishment by the jury.

The special judge who tried the case, by an oversight, failed to certify the statement of facts, but filed an affidavit afterwards, setting out this omission as an inadvertence, as the statement had been prepared, examined, and approved. This uncertified statement of facts is embodied in the record, and from it we make the following synopsis of the testimony:

Andrew Nelson, the first witness for the prosecution, says that he is a brother of the deceased; that, sometime in 1866, defendant told deceased that he (deceased) should not go to Georgetown and report on him about some horses which it had been alleged defendant and one Bargstrom had stolen; that if he did, he (defendant) would hurt him (deceased). He further stated that they were rebels' horses, and being so, it was no harm to take them, and deceased should not report the taking. Something was said about a mule taken from a pasture. This all occurred about four or five days before the killing. On cross-examination, witness testified that he caused the requisition to be obtained for defendant, who had fled the State after the killing. Had himself employed counsel to prosecute defendant, yet wanted him to have a fair trial. Never heard deceased make threats against defendant; nor did he ever know that deceased had any ill feelings towards the defendant. The deceased was not quarrelsome. Remembers calling at Berryman's, three or four miles north of Austin, and saw Mr. Nilson there once, but did not tell Nilson that "I had defendant in jail, and had money enough to keep him there as long as I wanted to." I did tell him defendant was in jail. I never had a quarrel with defendant. Bargstrom and defendant were together when defendant spoke of deceased testifying against "us" (defendant and Bargstrom) in regard to the horses.

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John T. Coffee, for the prosecution, swears that he saw deceased in the court-room on the day in the evening of which he was said to have been killed. Defendant and Bargstrom were also there. The occasion was the examining trial of Bargstrom for the alleged stealing of a horse, in which deceased was a witness for the State. Defendant, while deceased was on the stand, showed excitement, — talking Swedish, — seemed hostile, but can't say that the hostility was directed towards any one in particular. Knows defendant better now than then, and now knows him to be excitable from temperament; that his natural manner is impulsive, and that his excitement is part of his nature.

Thomas Gahagan, for the State, testified that he was at home on the night of the killing, about three-fourths of a mile from defendant's house. Between sundown and dark, heard a shot in the direction of defendant's. Before the killing — about one month — defendant told witness that he and deceased had quarrelled about a horse or mule; that deceased was crowding him, and trying to run over him; and that he (defendant) would hurt deceased before he would be run over thus. Defendant seemed to be enraged.

Ben Snyder, for the State, testified that he was present at a party at the house of the deceased, in 1866, when deceased and defendant had a row. Defendant and one Johnson were "jowering," when deceased interposed, saying he allowed no fuss there. Defendant had a gun. After this party, defendant and another Swede came to Nelson's and called witness to the fence. Defendant was talking to deceased about the deceased being a witness against him about some horses that had been stolen. Defendant asked deceased what he (deceased) would swear. Deceased replied that he had not reported them. Defendant said if deceased swore what he (defendant) had heard he would swear, he (defendant) would hurt deceased. This was a short time before the killing.

The testimony of one Harry recites the difficulty at the

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party, referred to by the previous witness, but says the disturbance seemed to be general, and that all the parties — naming several — were drinking somewhat. Defendant was talking to the deceased, and was attended by Bargstrom.

J. G. Hartstrom, for the State, testifies that he is now a resident of Red Wing, Minnesota, but formerly lived at Austin, Texas. Was present when deceased was killed. Himself, Jonas Bargstrom, Christerson, and defendant were together, and stopped at defendant's house. Shortly after reaching the house, one Rosengreen and old man Christerson came up in a wagon, and next deceased and one Newlin came up. Deceased started to Rosengreen, as if to talk to him. Defendant came out, and ordered deceased to leave the premises, to which deceased responded that he had come to speak to Rosengreen, and not to defendant. This was repeated by the parties, respectively, two or three times, when the deceased got mad, and cursed defendant. Defendant said nothing, but walked fast into the house, distant some yards from the fence, where all this transpired. Deceased got off his horse on the left side. As soon as deceased got off his horse defendant was right there. Deceased was stooping down. Witness did not see all of his body, but defendant shot him. The parties were very close, and just outside defendant's fence. Before shooting, defendant said, "Go away, and leave;" deceased got mad, and cursed the defendant. Did not see him have a gun until after he shot. After defendant shot, Newlin said, "You have killed my brother-in-law, but not me." Defendant then drew his gun, and Newlin ran off fast. Defendant went back into the house after deceased fell. Bargstrom and I carried the body into the defendant's house after he was killed, and found no knife or pistol on him. Did not see Carlson any more. Before the killing (same day, in the morning), defendant told the witness that he and deceased were bitter enemies; that deceased was bothering

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him a great deal, and he didn't think it "could be" unless one or the other be killed. On cross-examination, says that his expenses from Red Wing and back, and what his daily wages there amounts to,—\$1.50 or \$1.75 per day,—are paid him by Andrew Nelson, brother of the deceased, and the prosecuting witness. When deceased stooped and was shot, witness did not see him pick up a stone or stick. Never knew of deceased being in any fusses or difficulties.

The testimony of Andrew Newlin, for the State, is substantially the same as that of the prosecuting witness, except that on the day of the trial of Bargstrom before the examining court, referred to by Judge Coffee, the defendant became very angry while deceased was testifying against Bargstrom, and said that he (deceased) would not live to swear against him (defendant), and that he (deceased) had sworn a lie. Defendant had been indicted for stealing a mule, and thought that deceased would testify against him, and was mad. When deceased started up to the fence at defendant's house, where defendant, Rosengreen, and others were, witness advised deceased not to go, as defendant was mad; but deceased said he must see Rosengreen then, and thought defendant was only bluffing. Witness told deceased that Rosengreen would be at his (witness's) house that night, and could be seen there, but deceased said he must see him then. From here the testimony is much the same as that of Hartstrom.

Margaret Christerson was the first witness introduced by the defence. She is the mother-in-law of defendant, and first knew of the presence of deceased on the premises by hearing him swearing. "When I told defendant's wife that deceased was out there, she went out and asked deceased to leave, and not stand out there hollowing. Deceased made no reply to her. I saw defendant when his wife spoke to deceased, and did not hear him say anything. I saw defendant go into the house and come out with something

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by his side, but I don't know what it was. When he (defendant) came out of the house, deceased got off of his horse. I did not see them after that, as it was twilight. I heard the shot, but could not see who fired it. Defendant then said: 'This man (the deceased) has been after my life for a long time.' Witness was at the party testified to heretofore; went with defendant and came home with him, and knows that he carried no gun, nor brought one away.'" On cross-examination, the witness states that she saw a gun in defendant's hand after the shot.

Mrs. Munson, sworn for the defence, says that in 1866 she lived on the Watkins place, in Williamson County. Previous to the killing, heard the deceased say that if defendant did not keep his mule out of his (deceased's) pasture, he (deceased) would kill him (defendant), and the mule too. Thinks this was before the war. After figuring, witness thought this happened some fifteen or sixteen years ago.

Jonas Christerson, for the defence, testified that he was at the house the evening deceased was killed. The first he knew of deceased's presence there was hearing him talking in a loud and unfriendly voice. Saw defendant go into the house and come out with something in his hand, like a gun, and heard the shot immediately after he passed out of the house. When the defendant threw his gun on the ground, after the shooting, heard him say to his wife, "It may so happen that we are separated now for a good while." Did not see defendant after the shooting until in Georgetown, about six months ago. He and deceased disputed about the war; sometimes had disagreements, and at times were friends. Never heard defendant make any threats against deceased.

George Richardson, for the defence, testified that he was at defendant's house when deceased and others came up. Heard defendant tell deceased to go off; to which he answered that he would go when he had seen Rosengreen.

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This order and response were repeated once or twice, when defendant remarked that he had something that would make him go, and then turned and went into the house, and came back. Deceased got off his horse on the left side, with his right hand on his saddle, his left holding the bridle-rein. Saw defendant dodge, but did not see deceased throw anything. Heard a lick, and then the shot, almost together. Before deceased dismounted, he placed his right hand to his left side quickly, cursed defendant, and said, "I will kill you before I leave to-night." Defendant got the gun before deceased got off the horse. Looked at the place where deceased fell, that night and next morning. There was a stick there, and deceased's hand was on it. While the two were quarrelling, and before deceased got off the horse, saw him place his right hand to his left side quickly.

John Northington, for the defence, swears that Newlin offered him (witness being a juror), when he was summoned, two of his "best beef steers" if he would hang the jury. Newlin, for the prosecution, denies this offer under oath. Other witnesses, under oath, testify to the good character of defendant.

Walton, Green & Hill, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. At the September term, 1878, of the District Court of Williamson County, the appellant was tried for the murder of one August Nelson, charged in the indictment, which was presented on November 1, 1866, to have been committed in the county of Williamson, on May 17, A. D. 1866. On the trial the accused was convicted of murder in the second degree, and his punishment assessed at confinement in the State penitentiary for a period of nine years. A motion for a new trial was made and over-

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ruled, and from the judgment of conviction this appeal is prosecuted.

We are not permitted to inquire into several interesting features of the case discussed by counsel for the appellant, for the reason that the record presents no such statement of the testimony adduced on the trial below as will permit an inquiry into the evidence. Indeed, counsel do not fail to realize this difficulty in the way of presenting their views of the case, and, in order to relieve themselves of this embarrassing feature, have presented an affidavit of the judge who presided at the trial, explaining how it occurred that a statement of facts was not prepared and properly certified as a part of the record. But this only makes more apparent the fact, patent on the face of the transcript, that the case is before us without a statement of facts such as the law requires.

The effects of this omission are settled by a long line of decisions, commencing soon after the enactment of the statutes on that subject. As to the manner of presenting the evidence in a criminal case on appeal, the Code of Criminal Procedure (art. 604) directs that —

“ A statement of facts in a criminal action shall be agreed upon by the district attorney and the defendant, or his counsel ; and when they fail to agree, the same shall be made out and certified as directed in civil suits. In preparing a statement of facts, the rules in civil suits shall apply as to the manner and form of preparing and sending up the same.”

For the rules in civil suits as to the manner and form of preparing and sending up a statement of facts, see Paschal's Digest, art. 1490. And in this respect the statute directs that the trial in the appellate tribunal shall be on a statement of facts as agreed upon by the parties, or their attorneys, certified by the judge below ; or, should the parties fail to agree, then the judge of the court below shall certify the facts. Pasc. Dig., art. 1581.

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These statutes have been before the courts, and every portion, it seems, has been subjected to judicial criticism; but it is believed that it has not been held obligatory on the judge in the first instance to prepare a statement of facts in any case, either civil or criminal. On the contrary, it only becomes the judge's duty on failure of attorneys to agree. This is the evident import of the statutes on the subject, and has been so held in various decisions; and it has as uniformly been held that the approval or certificate and signature of the judge is indispensable to the validity of a statement of facts to entitle it to be considered on appeal, for any purpose. *Kelso v. Townsend*, 13 Texas, 140; *Lacey v. Ashe*, 21 Texas, 394 (since this last-named case, the rule requiring seals of attorneys or judges in certifying a statement of facts has been held as directory merely, and the signatures of attorneys and judges are held to be the proper test of authenticity). See *Branch v. The State*, 3 Texas Ct. App. 99; *Trevinio v. The State*, 2 Texas Ct. App. 90, and authorities there cited; *Keef v. The State*, 44 Texas, 582; *Koontz v. The State*, 41 Texas, 571, cited in *Brooks's case*, 2 Texas Ct. App. 1.

In the latter case it was said: "Without a statement of the evidence before the jury, it cannot be ascertained whether the grounds of the motion for a new trial were well taken or not;" and in that case the court declined to do more than to see that the indictment sustained the charge and the finding of the jury. See, also, the following cases reported in 3 Texas Ct. App.: *Wakefield v. The State*, 39; *Gindrat v. The State*, 573; *Roberts v. The State*, 47; *Booker v. The State*, 227; *Longley v. The State*, 611; *Courtney v. The State*, 257.

After the expiration of the term, the judge has no control over the preparation of a statement of facts. *Ferrell v. The State*, 2 Texas Ct. App. 399.

In Longley's case, cited above, it was said: "It is the

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general rule, now well settled by a long current of decisions, that without a statement of the facts in evidence before the court and jury, this court, on appeal, will only consider whether the indictment will sustain the charge and the finding of the jury." See authorities there cited upon which the rule rests.

We are compelled to try a case upon the record, and whenever it is there apparent that a certain fact exists or does not exist, we are not at liberty to shut our eyes to it, whether noticed in the argument or not. It being a settled rule, without a statement of facts, not to consider more than as to whether the indictment will sustain the charge to the jury, and the finding of the jury, our labors become very much restricted in the investigation of the present case.

The case of *Trammel v. The State*, 1 Texas Ct. App. 121, is relied on for authority upon which the judgment in the present case should be reversed. It is only necessary to remark that the cases are entirely dissimilar.

It is urged on behalf of appellant that the judge below erred, both in admitting evidence offered by the State and in excluding evidence offered by the accused, and attempted to be drawn out of the State's witnesses on cross-examination; but, so far as we have been enabled to determine from the second bill of exceptions, in the absence of a statement of facts, we are unable to discover that the cause of the defendant was prejudiced in any material degree by any of the rulings made.

It is stated in one of the bills of exception that the defendant offered to prove by the witness John Palm the following facts: "That he (witness) knew John Carlson and August Nelson; that after said Carlson had killed said Nelson, in May, 1866, he (witness) went to Missouri in the year 1867 (latter part) or first of 1868, and there met Carlson, who was living openly with his family in the town

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of Carthage ; that on his return to the county of Williamson, shortly after seeing said Carlson, he (witness) informed Andrew Nelson, the private prosecutor in this case, of the whereabouts of said Carlson ; that said Carlson expressed himself anxious to return to Texas and stand his trial, but that he did not possess the means to do so, and that the information was conveyed to said Nelson at the request of Carlson ; and, further, that the whereabouts of said Carlson was generally and notoriously known in the county of Williamson for many years before the spring of 1878 ; to the proof of which facts the State objected by counsel, because the same was irrelevant and immaterial." The court sustained the objection, and the defendant took a bill of exceptions to the ruling.

Another bill of exceptions states : " The defendant, on the cross-examination of the witness A. J. Nelson, offered to prove by said witness, — he himself being the private prosecutor, — for the purpose of showing the *animus* of said witness, the same to go to his credibility, that he, said witness, knew, or at least had direct and positive information as to the exact whereabouts of the defendant in the State of Missouri, from which State he was brought by requisition, for a number of years prior to the time when he took active measures to secure the arrest of defendant, it having been already shown that he did not act until [the persons named] were dead, they being parties who were present at the killing, and on whom defendant relied in defence ; to which the State, by counsel, objected, because said evidence was immaterial." The court sustained the objection, to which the defendant took a bill of exceptions. In these and kindred rulings we cannot perceive any possible injury to the accused. If the facts be, as intimated in these bills of exception, that the accused, after the homicide, went to a distant portion of the country, and there remained and lived openly with his family for a number of years prior to

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his arrest, and these facts were known to the community of the homicide and to the relations of the deceased, we are unable to see that these circumstances could, if proved, have benefited the accused; and if he has so remained away until after the death of important witnesses, he so remained away at his own peril. We see no reason why he could not have returned and placed himself under the protection of the law long years before the time of his arrest and return on requisition, as mentioned in the bill of exceptions, there being no intimation that the deceased persons did not die natural deaths.

Still, we are of opinion that these questions are not properly before us, and that they cannot properly avail the appellant; unless, indeed, the bill of exceptions had contained all the evidence, when he could have, perhaps, availed himself of the rule in *Bennett v. Dowling*, 22 Texas, 660, where it was said: "The bill of exceptions, under the hand and seal of the presiding judge, contains a full statement of all the facts given in evidence, according to the certificate attached thereto, and was intended to embrace both a statement of facts as well as the bill of exceptions."

Another bill of exceptions recites "that, on the trial of this cause, the State having placed Andrew Nelson on the stand, and he having testified as set out in the statement of facts, the defendant offered to prove by the said witness, on further cross-examination, as follows, for the purpose of showing the *animus* of the witness, it having been admitted and proved that he was the brother of deceased, and was the private prosecutor in the cause:

"1. That he was informed in the year 1869, by John Palm, that the defendant was openly residing in the town of Carthage, Missouri. 2. That the said defendant sent word to said witness by said Palm that he (defendant) was anxious to return and stand his trial, but that he was too poor to pay his expenses. 3. That it was generally known

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in the county of Williamson for many years where defendant, Carlson, was living; to which the State objected, because the same was immaterial." The objection was sustained by the court, and the defendant took a bill of exceptions.

This bill of exceptions recites a fact not before noticed,—that the alleged prosecuting witness was the brother of the deceased. We are of opinion that the naked, unexplained facts that the defendant was living openly in the State of Missouri, and that the witness did not promptly procure his arrest, or that he was a brother of deceased, were not calculated of themselves to discredit the witness further than, as already shown by the bill of exceptions, that he was the brother of the deceased, and the private prosecutor. His credibility was placed before the jury by a charge of which we see no grounds to complain.

What has already been said as to these bills of exception relates as well to others on the rulings upon the evidence.

Several objections to the charge of the court were made in the motion for a new trial, which we deem unnecessary to consider specially. As to the general charge, we fail to discover anything other than a careful regard for the law, and the rights of the State and the accused. The enunciations of the law as to murder in the first and second degrees, and of manslaughter, together with homicide in self-defence and upon previous threats, as well as the definition of express and implied malice, reasonable doubt, and the presumption of innocence, were all eminently fair and correct. And whilst we are unable to see any special necessity for the special instructions given at the instance of the prosecution, and for the accused, we fail to find in them any statement or conclusion calculated to prejudice or mislead the jury, or in any manner injure the rights of the accused.

In fact, the whole conduct of the judge, in view of able and skilful counsel, has, so far as we can determine

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from the voluminous record before us, not only endeavored to, but has succeeded in holding the scales of justice with a steady and equal hand; and, judging therefrom, we feel warranted in the conclusion that if any injustice had been done the accused on the trial, the judge would have remedied the error by granting a new trial.

The apellant has been well and ably defended, and, so far as we can see, has had the full benefit of a fair and impartial trial, before a proper jury, and on a sufficient indictment, and we find nothing in the record to warrant a reversal of the judgment. The judgment is affirmed.

Affirmed.

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28	179

A. SHOEFERCATER v. THE STATE.

1. **THEFT OF CATTLE—EVIDENCE.**—In a trial for theft of cattle, the State proved the ownership as alleged. The defendant adduced testimony tending to prove that he purchased the animals from one A., not the owner; and, in further proof of the purchase, offered an unrecorded bill of sale, entirely in the handwriting of an attesting witness, and not proved to be the act of A. *Held*, properly excluded, on objection of the State.
2. **SAME—CHARGE OF COURT.**—The jury were instructed for acquittal if they found that the accused purchased the animals from A. in good faith, whether he took a bill of sale or not; but that, if the sale was not in good faith, but made to cover a fraudulent taking, it was no defence. *Held*, a proper question for the jury, and fairly presented for their determination.
3. **SAME—LIMITATION.**—Trying an indictment for theft, which was filed March 6, 1877, the court charged that the offence was not barred by limitation if it was committed within five years preceding the 15th of March, 1877. *Held*, erroneous, because this warranted a conviction if the offence was committed after the filing of the indictment, —i. e., between March 6 and 18, 1877.
4. **TIME** is not material, except it be of the essence of the offence charged, and in general the commission of the offence need not be proved as of the date alleged; but when a limitation is prescribed for presentation of an indictment, the time alleged must be within the time limited, and not an impossible day, or a day subsequent to the filing of the indictment.

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APPEAL from the District Court of Blanco. Tried below before the Hon. L. W. MOORE.

The opinion states the case.

W. W. Martin, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant was indicted at the March term, A. D. 1877, of the District Court of Blanco County, for the theft of two oxen. The indictment charges that the oxen were stolen by appellant on August 1, 1876. He was tried and convicted at the September term, A. D. 1878, of said court, and his punishment was assessed at two years' confinement in the penitentiary.

Defendant made a motion for a new trial, which was overruled. He has appealed the cause to this court, and has assigned the following errors :

“ 1st. The court erred in excluding from the jury the instrument of writing set out and described in defendant's bill of exceptions.

“ 2d. The court erred in its charge to the jury, in the latitude given them on the question of time as to when the offence was committed.

“ 3d. The court erred in the second section of the charge, which was as follows: ‘If you believe the defendant did buy the animals from another in good faith, whether he took a bill of sale or not, he is not guilty. But if you believe, from all the circumstances surrounding the transaction in proof, that the sale was not made in good faith, but only to cover a fraudulent taking, then such sale would be no defence.’

“ 4th. The court erred in the third section of the charge, in not requiring the jury to find that the oxen were taken

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from the possession of the owner by the defendant, or from the possession of some one holding the same for him; and in the latitude given to the jury as to the question of time.

“ 5th. The court erred in overruling defendant’s motion for new trial.”

Besides the errors specified in the first, second, third, and fourth assignments, the defendant, in his motion for new trial, insists that the venue was not proven, and that the charge of the court to the jury failed to give the law applicable to the case under the facts proved.

The statement of facts shows that a yoke of oxen, the property of the person named in the indictment as their owner, suddenly disappeared from their accustomed range about the month of August, 1875. They ranged near the house of their owner, on Little Blanco, in Blanco County. The said owner of the oxen testified that he never sold them to anybody, and that he never authorized the defendant, or any one else, to take or sell them. The owner never got his oxen again.

About the time that they disappeared, as before stated, they were seen in possession of defendant, who claimed and sold them as his property. The theory of the defence is that he purchased them in good faith from one G. C. Arthur, trading his horse for them. In support of this defence, he offered in evidence a certain instrument in writing, which, on its face, purports to be a bill of sale from Arthur to defendant for the oxen. After the defence had first examined one Andrew Williamson (the only witness introduced by the defendant) in regard to the execution of the instrument, the county attorney objected to the reading of the bill of sale to the jury because it was not proven, and the court sustained his objection. We do not believe that the court erred in excluding this evidence from the jury. The instrument offered in evidence had not been recorded. The execution of it by Arthur, or by his authority, had not

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been proved. The proof shows that the entire instrument was in the handwriting of the attesting witness, Talbert, and no authority is shown from Arthur to Talbert to sign his (Arthur's) name to the same.

We make the following extracts from the testimony of the witness Williamson. He says: "In the summer of 1875, one evening a man came to where I had a herd of cattle, about two miles from my father's house, with a yoke of steers, and wanted to trade them to me. I told him I did not want to buy them. I drove my cattle home to my father's house; when we got to the house, defendant was there. I live in Hays County, with my father, at Purgatory Springs. The man that had the steers called himself Arthur. I did not know him; never saw him before, nor have I ever seen him since. Arthur let defendant have the steers, and defendant let him have his pony. Arthur led defendant's pony off, and left the steers. I do not know how defendant and Arthur traded. I did not hear the trade between them." This witness describes the oxen as of red color, and one of them as having the same brand as the brand proved by all the State's witnesses to be on one of the stolen animals. Williamson also testifies that he did not know whether the other ox was branded or not. The jury evidently either did not believe the testimony of the witness Williamson, or believed that it was a sham trade between the person calling himself Arthur and the defendant. This disposes of the first error assigned.

The next point is as to whether the jury were given too much latitude by the charge of the court on the question of time. We will pass this proposition for the present. The same question is presented by the defendant in the fourth error assigned, and we will consider the two propositions together.

It is sufficient for us to say that the portion of the charge of the court which is copied into the third error assigned is

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unexceptionable, and sets forth the law applicable to the case with great fairness to the defendant. It certainly is as favorable to the defendant as he was entitled to, and has direct application to the evidence. It was a proper question to be left to the jury to determine whether the defendant traded with Arthur for the oxen in good faith, or whether the transaction between them was only a device to cover a fraudulent taking on their part.

This brings us to the most material questions presented in the record. The third subdivision of the charge of the court, if it is correctly copied in the transcript before us, is as follows: "But if you believe the defendant did, within five years preceding March 13th, 1877, fraudulently take two oxen, the property of one Carl Schitz, or either of them, in this county and State, without his consent, with intent to deprive him of the value of same, and to appropriate it to his own use, then he is guilty, and you will so find, and assess his punishment by confinement in the penitentiary not less than two nor more than five years."

We believe that the above instruction is erroneous, for two reasons: first, because it does not instruct the jury that they must find that the oxen were taken by the defendant *from the possession of their owner, or from the possession of some one holding the same for the owner*, before they can find defendant guilty; and, second, because the jury are not properly instructed as to the time within which they must find that the offence was committed.

In a case of theft of cattle, which is a felony, the prosecution may prove that the offence was committed at any time within five years next preceding the indictment. Pasc. Dig., art. 2650. The indictment, as shown by the file-mark, was presented by the grand jury on March 6, 1877, and by this charge of the court the jury are not limited to five years next before the filing of the indictment, but are directed by the court to go back five years preceding March 13, 1877, which would authorize them to find that

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the offence was committed seven days subsequent to the indictment.

As a general rule, the prosecution is not required to prove that the offence was committed at the exact time alleged in the indictment. Time is not material, except when of the essence of the offence. When a time is limited by the statute for preferring an indictment, the time laid should appear within the time limited. An indictment alleging the offence to have been committed on an impossible day, or a day subsequent to the indictment, is defective. There is a class of cases in which time is not material. See Arch. Cr. Pl. 370; Whart. Cr. Law, secs. 274, 275. The offence of which defendant is charged is not embraced within it.

We do not believe the charge of the court, taken as a whole, corrects the errors which we have herein specified. It is a matter of the highest importance to a defendant who is on trial for an offence involving both character and liberty that the court should correctly charge the law to the jury. The objections to the charge which we are discussing were first called to the attention of the court below by defendant in his motion for a new trial.

For these errors committed by the court in the charge to the jury, the judgment is reversed and the cause remanded.

Reversed and remanded.

LOUIS HALFIN v. THE STATE.

IMMUNITY BY REPEAL OF PENAL LAW—LOCAL OPTION.—The repeal of a penal law, when the repealing statute substitutes no other penalty, exempts from punishment all persons who have offended against the provisions of such repealed law, unless it be declared otherwise in the repealing statute. Wherefore, in a county which adopted, and has since rescinded, the local-option law of 1876, there is no legal authority for the punishment of persons who sold liquor in the county while it sustained the local-option law.

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APPEAL from the County Court of Caldwell. Tried below before the Hon. E. H. ROGAN, County Judge.

The appellant was convicted in the County Court of Caldwell County of having sold spirituous liquors, the "local-option law" being then in force in said county. It appears from the record that, since the institution of this prosecution before the County Court, another election upon the question of repealing the local-option law or continuing it in operation in said county was held, which resulted against the law. The defence claimed immunity from prosecution, claiming that the repeal of the local-option law by the last election relieved him, and the opinion of this court is directed to that point.

Nix & Story, and *Stringfellow & McNeal*, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The appellant is prosecuted by information in the County Court, and was convicted on a charge of having violated the provisions of the act of the Legislature of 1876 entitled "An act to prohibit the sale, exchange, or gift of intoxicating liquors in any county, justice's precinct, city, or town in this State that may so elect; prescribing the mode of election, and affixing a punishment for its violation,"—commonly known as the local-option law. Acts 1876, p. 26.

It is not disputed that, prior to the alleged commission of the offence charged against the appellant, Caldwell County had, by vote in accordance with the provisions of the act, declared that liquors should not be sold in the county except as authorized by the act aforesaid. But it is insisted on behalf of the appellant that, since this prosecution was com-

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menced, another election has been held in the county under the provisions of the act in question, by which it was determined that the act should no longer be enforced so as to prohibit the sale of liquors in the county; and that the effect of this last election is to relieve from prosecution and punishment those who had, prior thereto, been accused of violating its provisions.

It is provided, in the third section of the act, for the holding of a special session of the Commissioners' Court, for the purpose of opening the polls and counting the votes, and directing that "if a majority of the votes cast are *for prohibition*, said court shall immediately make an order declaring the result of said vote, and absolutely prohibiting the sale of intoxicating liquors within the prescribed bounds (except for the purposes specified in section 1 of this act) until such time as the qualified voters therein may, at a legal election held for the purpose, by a majority vote decide otherwise." The section goes on to prescribe the manner of making publication of the result and the order of prohibition.

We are of opinion that the words in the third section, "*until such time as the qualified voters therein may, at a legal election held for the purpose, by a majority vote decide otherwise,*" must be construed as an authority giving the voters interested an opportunity to decide — after the expiration of twelve months, mentioned in the fourth section — by vote whether the prohibition named in the first section shall be longer continued or not, and that a majority vote at this second election would annul, from the time it is held and the result declared and published, the prohibition provided for in the first section of the act.

It being made to appear that the second election contemplated in the act has been held, and that it has resulted in a majority vote against prohibition, we are of opinion that there is no law now in force in Caldwell County by which

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persons who may be charged under the act can lawfully be punished.

“The repeal of a penal law, when the repealing statute substitutes no other penalty, will be held to exempt from punishment all persons who have offended against the provisions of said repealed law, unless it be declared otherwise in the repealing statute.” Penal Code, art. 15 (Pasc. Dig., arts. 16, 17); *Montgomery v. The State*, 2 Texas Ct. App. 618.

There being no law now in force in Caldwell County to punish offenders against the local-option law, since its annulment by the second vote of the county against prohibition, the judgment will be reversed and this prosecution will be dismissed.

Reversed and dismissed.

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28	533

C. W. COOPER v. THE STATE.

BAIL. — When the State, by its lawful authority, removes the accused from the control of his sureties, as by convicting him to the penitentiary, they are relieved from the operation of their bail-bond; and, in defence to *scire facias*, are entitled to allege and prove it as a good and legal reason why the judgment *nisi* should be vacated.

APPEAL from the District Court of Jack. Tried below before the Hon. J. R. FLEMING.

No brief for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. This case is an appeal taken by C. W. Cooper on a judgment final rendered against him by the District Court of Jack County, on a forfeited bail-bond. It

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appears that one Jim Pate, who was indicted for theft of cattle, executed the bond in question, with C. W. Cooper and James R. Callis as his sureties, to the sheriff of Parker County, on October 13, 1875, for the personal appearance of the said Pate at the next term of the District Court of Jack County, on the fourth Monday in October, 1875, to answer the charge. Pate failed to appear at the May term, 1877, of the District Court of Jack County, and a judgment *nisi* was rendered against him and his sureties. At the November term, 1877, of the court Cooper appeared, and, in answer to the *scire facias*, stated that the judgment *nisi* rendered against him on May 9, 1877, in the case of *The State of Texas v. Jim Pate*, set out in the *scire facias*, should not be made final, because Pate, the principal in the bond forfeited, had been regularly indicted, tried, and convicted of a felony in the District Court of Parker County, State of Texas, at its April term, 1876, for the term of two years, and that by virtue of the trial and conviction as aforesaid the said Pate was held under process of the District Court of Parker County, issued pursuant to the judgment aforesaid, and was by said process of law restrained of his liberty, and by such restraint was prevented from being in attendance upon the May term, A. D. 1877, of the District Court of Jack County, where the forfeiture was taken; wherefore appellant prayed that the forfeiture *nisi* be set aside, etc.

The court, after hearing said answer read, was of the opinion that it set up no legal or valid cause why the judgment *nisi* should not be made final, and refused to hear any evidence to sustain said answer, but proceeded at once to render a final judgment against Pate and Cooper on the bond. Cooper excepted to this ruling, and has taken an appeal to this court.

We believe that the answer of appellant set up a good and legal cause why the judgment *nisi* should not be made

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final, and that the court below should have allowed him to introduce evidence to sustain the allegations made in his answer.

Bail is the security given by a person accused of an offence that he will appear and answer before the proper court the accusation brought against him. Those who become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted. Bail, says Mr. Bouvier, are those persons who become sureties of the defendant in court. Again, he says, their powers over the defendant are very extensive, as they are supposed to have the custody of the defendant.

In the case of *Gay v. The State*, 20 Texas, 507, Mr. Justice Wheeler speaks of them as being “manucaptors of the defendant, — his jailers.” When the State, under lawful authority, has deprived the securities of control over their principal, and placed it beyond their power to relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of Jack County, the State by its own act has changed their relation to the obligee in the bond. The trial and conviction of the principal in the bond for a felony, and his confinement by the State in pursuance of the judgment of conviction, were acts inconsistent with any rights in the bail to the custody of Pate.

In the case of *Peacock v. The State*, 44 Texas, 11, the Supreme Court decided that the sureties on a bail-bond are relieved by a second arrest and bail of their principal on the same indictment, even though the second bond was held defective and quashed. We make the following extract from that opinion: “So long as Miller was left in the custody of his bail, or was under their control, they were bound for his appearance, and liable for the penalty of the bond for his non-appearance. Any act done by the State or its officers, under lawful authority, that would deprive the securities of control over their principal, would change the

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relation the parties sustained to each other and their relation to the State, and would thereby relieve the sureties from their obligation.”

In the State of Tennessee, where the governor of one State, on the demand of the governor of another State, surrendered a person who had been previously arrested for murder in the former State, and bound over, and who was on bail at the time of the demand made, it was held that the delivery of him by the former State to the constituted authorities of the latter discharged the bail from his recognizance. *The State v. Allen*, 2 Humph. 258. See also *Canby v. Griffin*, 3 Harr. 333; *The People v. Stager*, 10 Wend. 437.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

RILEY BLANKENSHIP v. THE STATE.

1. CONTINUANCE. — This court will not consider a refusal of the court below to grant a continuance, unless the ruling of the court was duly excepted to and a bill of exceptions saved at the time.
2. THEFT OF ANIMALS. — Note in the opinion a state of proof held sufficient to sustain a conviction for theft of animals, notwithstanding positive testimony that the accused purchased them from a stranger.

APPEAL from the District Court of Comanche. Tried below before the Hon. J. R. FLEMING.

The charge was the theft of certain steers.

No brief for the appellant.

George McCormick, Assistant Attorney-General, for the State.

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WHITE, J. Refusal to grant an application for a continuance will not be considered or revised by this court unless duly excepted to at the time, and a bill of exceptions saved to the ruling, which must also be incorporated in the record. *Nelson v. The State*, 1 Texas Ct. App. 41; *Brooks v. The State*, 2 Texas Ct. App. 1; *Grant v. The State*, 3 Texas Ct. App. 1; *Owens v. The State*, 4 Texas Ct. App. 153; *Allen v. The State*, 4 Texas Ct. App. 581.

Want of sufficiency in the evidence to sustain the indictment in this case is the only other objection raised in the motion for a new trial and assignment of errors.

Throughout the trial the record discloses that the theory of the defence was that accused had purchased in good faith, and obtained a bill of sale for the stolen steers. As stated in the evidence introduced by defendant, he and one or two other companions were going along the road, and met two strangers, who, after conversing with them awhile, inquired about these steers, and the result was the sale by the strangers and purchase of them by the defendant, for the sum of \$10. These strangers were not seen there; had never, in fact, been seen before nor since by any other persons in that section of the country. It is attempted to be shown that they victimized the unfortunate and innocent defendant by getting his money for a worthless title to property they never owned, and disappeared without leaving a single trace behind save the bill of sale.

It is astonishing to note the frequency with which this same defence is made in criminal trials for theft of animals. In fact, it has become so stereotyped that no county attorney who understands his business objects to the introduction in evidence of such a bill of sale, no matter how irregular; and an honest jury is rarely ever deceived by it, even to the extent of a desire for seizing it as a hook upon which to hang the veriest ghost of a reasonable doubt.

In this case, though defendant's witness recited, with the

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most minute circumstantiality, all the interesting details of the interview between the stranger and the accused, which finally eventuated in the sale and purchase of these steers and the execution of the written bill of sale, giving the names of all the parties and witnesses to the same; and notwithstanding the particularity and perspicuity with which he explained and testified to all the surrounding circumstances, the bill of sale, after being thus positively proven, was not produced and offered in evidence on the trial, nor its absence even attempted to be accounted for by defendant.

The State fully made out her case, and the judgment is in all things affirmed.

Affirmed.

CÆSAR BOZIER v. THE STATE.

1. SWINDLING. — The purchase of property upon the faith and credit of some other person, falsely representing that such other person had given his authority to the purchaser, comes within the meaning of the specific offence denominated "swindling."
2. EVIDENCE. — The accused in this case offered testimony to prove that the articles were purchased for the family of the person whose credit was used, and were delivered to his wife, which testimony was rejected by the court, because "any subsequent disposition which defendant may have made of the property acquired in the manner charged could neither justify nor excuse the act of so acquiring it." *Held*, that this is a correct principle in the abstract; but when, as in this case, the question of *authority* was the essence of the controversy, it was error to exclude such testimony.
3. CONTINUANCE. — An application for a continuance, regular in every respect, and based upon the absence of testimony substantially the same as that excluded and above indicated, was improperly denied, because, as the State relied solely upon the testimony of the prosecuting witness for a conviction, as opposed by the statements of the accused to the merchants, the representations of the accused, if supported by additional testimony that the purchases were made for and delivered to the prosecuting witness's family, might have become material in aiding the jury to determine which of the two statements was true; and if it would have enabled them

5	220
81	215
5	220
38	292

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to find that of the defendant to be true, or if sufficient to create a reasonable doubt, an acquittal would necessarily have followed. In this aspect of the case, the testimony might have become not only important, but altogether material.

4. **APPEAL.** — An appeal may be taken by the defendant in every criminal case when judgment of conviction has been rendered against him in the court below, and such appeal may be taken at any time during the term of the court at which the conviction is had. It is taken by giving notice thereof, and having the same entered of record. The effect of an appeal is to suspend and arrest all further proceedings until the judgment of this court has reached the court below.
5. **SAME — SENTENCE.** — In cases of felony, when an appeal from the judgment is taken, sentence should not be pronounced, but should be suspended until the decision of this court has been received. And further, when the defendant fails to appeal until after sentence has been pronounced, the appeal should nevertheless be allowed if demanded, and it has the effect of superseding the sentence and all other proceedings as fully as if taken at the proper time. The court in this case erred in pronouncing sentence on defendant after he had appealed, and over his objections.

APPEAL from the District Court of Orange. Tried below before the Hon. H. C. PEDIGO.

No brief for the appellant has reached the reporters.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. One of the wrongful acts made by express terms of the statute to come within the meaning of the specific offence denominated “swindling” is “the purchase of property upon the faith and credit of some other person, upon the false pretence that such other person has given the accused the right to use his name or credit in making the acquisition.” *Pasc. Dig.*, art. 2427.

Appellant in this case was charged with having used the name of one Ed Davis, without his knowledge or consent, in the acquisition of certain groceries and provisions from the store of Norsworthy & Wingate, merchants, whereby

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the latter were swindled. This is the substance of the indictment. In its formal averments it conforms to the recognized standard authorities and precedents, and is sufficient.

To prove the falsity of the statements made by defendant to Norsworthy & Wingate, the State relies entirely upon the testimony of Davis. As shown by the evidence, at the time the articles were obtained Davis was sick; and there is evidence going to show that they were taken by defendant to Davis's house, where they were eaten and used by the family. Before going into the trial, defendant applied for a continuance, to enable him to procure the testimony of Mrs. Rosenbaum, by whom he states he can prove that the articles "were purchased for the family of the State's witness, Ed Davis," and "were delivered to Mrs. Davis, his wife." This application showed due diligence, but was overruled by the court for the same reason, partly, we presume, as given for ruling out or refusing to permit the introduction of other testimony of a similar character, to wit, "that any subsequent disposition which defendant may have made of the property acquired in the manner charged in the indictment could neither justify nor excuse the act of so acquiring it." Now, whilst this reason given by the court is true in the abstract, yet it must be remembered that the controversy in the case — and it was the pivotal point upon which it turned — was whether the witness Davis had authorized accused to procure the articles. On the one hand, we have the statement of the accused made to the merchant, and on the other the contradicting statement of Davis on the trial, unsupported by any other evidence on that point.

If the defendant could prove by the witness that he had purchased the articles for Davis's family, and had brought them to his house and turned them over to his wife, it was a circumstance which might have been material in aiding the jury to determine which of the two statements was true; and if it enabled them to find affirmatively in favor of the

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one made by defendant, or if it was sufficient to create in their minds a reasonable doubt as to the matter, his acquittal would necessarily have followed. In this aspect of the case the testimony might become not only important, but altogether material. And so believing, we are of opinion that the court erred in overruling the application and refusing the continuance. This error alone would necessitate a reversal of the case.

There is another error complained of which we are called upon to notice, because presented fully by the ninth bill of exceptions, reserved and certified at the time, and shown by the record in these words: "9. Be it further remembered that the defendant, by his counsel, then gave notice of appeal, but the court proceeded and did pass the sentence of the law upon said defendant; to which the defendant now here excepts." We find this exception fully sustained by the final judgment and sentence, which we copy, viz.:

" State of Texas }
 v. } June 29, 1878.
" Cæsar Bozier, }

" Now, on this day came on to be heard the motion for a new trial herein filed by the defendant's attorney, and the same being heard and considered by the court, it is ordered that said motion be, and the same is here overruled. Whereupon came on to be heard the motion in arrest of judgment herein filed by this defendant, and the same being duly considered by the court, it is ordered that the said motion be, and the same is here overruled; to which ruling defendant, by attorney, excepts, and gave notice of appeal to the Court of Appeals. Whereupon the said defendant, Cæsar Bozier, who had been tried on a previous day of the term, to wit, June 28, 1878, upon a charge of swindling, and found guilty of said charge, and his punishment assessed at confinement in the State penitentiary for

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the term of two years, being in open court, was caused to stand up, and asked by the court if there was reason why the sentence of the law should not be pronounced against him, failed to give any lawful reason; whereupon the following sentence or judgment was pronounced by the court: It is ordered, adjudged, and decreed by the court that Cæsar Bozier, found guilty of the crime of 'swindling,' be confined to hard labor in the State penitentiary, at Huntsville, in Walker County, Texas, for the term of two years, and the sheriff of Orange County, on the adjournment of this court, will forthwith convey him to Huntsville and turn him over to the superintendent of the State penitentiary, in accordance with this decree."

The above is the judgment in full. There is in it, or afterwards, no order of suspension until the case is heard and determined on appeal; and a fair presumption is that the sentence has been executed, and that the defendant is now actually in the penitentiary, notwithstanding his appeal. If such is not the case, then it is simply because the judgment has not been obeyed.

Our statute provides all the rules of procedure relative to and regulating appeals. Amongst others, we note the following as bearing upon the question here raised:

"An appeal may be taken by the defendant in every criminal case where judgment of conviction has been rendered against him in the District Court," etc. Pasc. Dig., art. 3183.

"Art. 3189. An appeal may be taken by the defendant at any time during the term of the court at which conviction is had.

"Art. 3190. An appeal is taken by giving notice thereof, and having the same entered of record.

"Art. 3191. The effect of an appeal is to suspend and arrest all further proceedings until the judgment of the Supreme Court [Court of Appeals] has been received by the

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District Court.” *Lewis Hill v. The State*, decided at the present term.

“In cases of felony, where an appeal is taken, sentence shall not be pronounced, but shall be suspended until the decision of the Supreme Court [Court of Appeals] has been received.” Pasc. Dig., art. 3148.

In addition to the above, we have the further provision that, “where the defendant fails to appeal until after sentence has been pronounced, the appeal shall nevertheless be allowed, if demanded, and has the effect of superseding the sentence and all other proceedings as fully as if taken at the proper time.” Art. 3192.

It follows that the defendant has the right to appeal from a judgment before sentence, and that if he avails himself of the right, sentence cannot be legally pronounced against him, and all further proceedings are suspended until the appeal has performed its functions.

We know of no authority of law which permits the rights thus secured to be disregarded; and the action of the District Court of Orange County in passing sentence after defendant had appealed, and over his objections thereto, and the further action of ordering him to be taken forthwith to the penitentiary, notwithstanding his appeal, are also errors for which the case should be reversed.

It is not necessary to notice the other errors complained of, as those that would perhaps be tenable now are not likely to occur on a new trial.

For the reasons discussed, the judgment is reversed and cause remanded.

Reversed and remanded.

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JOHN WILLIAMS v. THE STATE.

1. VERDICT. — If, in the joint trial of several defendants, the finding of the jury as to some differs from their finding as to others, it is necessary that the verdict designate by their respective names the defendants to whom the findings severally relate. But in the trial of a single defendant, the verdict may designate him as "the defendant," without stating his name.
2. PROPER NAMES — MISNOMER. — There is no orthographical rule controlling the spelling of proper names. If the true and imputed names be *idem sonans* it is sufficient; and if they have a common derivation, even less particularity is requisite.
3. SAME — CASE STATED. — On trial of John *Williams* for theft, the verdict found "the defendant, John *William*," guilty. *Held*, that there is no uncertainty as to whom the verdict relates, and no material misnomer or variance; and that, under the authorities, the names are *idem sonans*. See the opinion *in extenso* on this question.
4. VERDICT — ASSESSMENT OF PENALTY. — A verdict which assesses the punishment at "five years' confinement in the penitentiary" sufficiently designates the duration and place of imprisonment. The law supplements the finding by prescribing that the imprisonment shall be at "hard labor."
5. VERDICTS are to have a reasonable construction and intendment, and are not to be avoided unless from necessity, originating in doubt of their import, or on account of the immateriality of the issue found, or a manifest tendency to work injustice.

APPEAL from the District Court of Victoria. Tried below before the Hon. H. C. PLEASANTS.

The opinion of the court discloses the case.

No brief for the appellant has reached the reporters.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. Two errors are assigned upon which reliance is placed for a reversal of the judgment of the District Court, by which the appellant was adjudged guilty of theft of a gelding, and his punishment assessed at five years' confinement in the State penitentiary.

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“ 1. The court erred in overruling the defendant’s motion for a new trial on the grounds set forth in his motion.

“ 2. The court erred in its fourth instruction to the jury, inasmuch that the question of a violated possession is not explained, if such possession was violated.”

Taking up first the second alleged error assigned: The judge, in his charge, in the first paragraph instructed the jury fully and clearly on the legal presumption of innocence and the reasonable doubt, in which connection the jury was charged “that the burden of proof rests always upon the State; and if, therefore, the jury should have a reasonable doubt as to the guilt or innocence of the defendant in this cause, they must acquit him.”

The second paragraph gives the jury the statutory definition of theft; the third charges the jury correctly as to the province of the jury in relation to the credibility of witnesses and the weight of the evidence, and they were told that it was the province of the court to explain and expound the law to the jury; and here follows the paragraph upon which error is assigned, in this language:

“ 4. From the definition of theft the jury will perceive that to warrant a conviction for that offence in any case the jury must be satisfied from the evidence, beyond a reasonable doubt, first, that the property was taken without the consent of the owner, and that it was taken by the accused; and, second, that it was taken with the intent to deprive the owner of the value of the property, and to appropriate the same to the use of the person taking.”

In view of the objection taken to this portion of the charge in the assignment of error above set out, the charge sufficiently explains the manner in which the possession of the owner may be violated by another in order to warrant a conviction for theft; and when considered in connection with the correct definition of the crime of theft, in a previous portion of the charge, and to which definition the attention

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of the jury was called in the paragraph which is assigned as error, we find nothing of which the appellant can complain.

The charge, taken as a whole, was a concise, plain, and correct enunciation of the law of the case as made by the evidence, in which all the rights of the accused were properly guarded.

As to the other error assigned, to wit, the overruling of the defendant's motion for a new trial, we have not deemed it important to notice, specially, but two of the grounds set out in the motion, namely, the second and third, which are set out in the motion as follows :

“ 2. The verdict does not set forth the name of the defendant.

“ 3. The verdict does not state the place where the defendant shall be confined.”

The verdict of the jury, as set out in the judgment of the court, and which is evidently intended to be a copy of that returned by the jury, is as follows : “ We, the jury, find the defendant, John William, ‘ guilty ’ as charged in the indictment, and assess his punishment at five years’ confinement in the penitentiary,”—signed by the foreman. This entry of the verdict in the minutes is followed immediately by the following : “ Wherefore it is considered, adjudged, and decreed by the court that the verdict be approved ; that the defendant, John Williams, be confined, * * * to await the further orders of this court.”

As above intimated, we only find what purports to be the verdict of the jury copied into the judgment. The actual finding of the jury and the verdict returned by them into court do not appear in the transcript ; unless, indeed, we presume that the jury came into court, and, having agreed, caused the verdict to be written on the minutes of the court and then signed by the foreman,—which was hardly the case. In the absence of any other, we will presume that the verdict copied in the minutes is a correct copy of the verdict

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returned by the jury, in considering the objections taken thereto in the motion for a new trial.

As to the objection that the verdict does not set forth the name of the defendant, we find that this objection is not sustained by the record, as will readily appear from the extracts from the minutes as above; unless, indeed, it be that in writing the name of the defendant the final letter "s" to the surname of the accused is omitted, making the name of the defendant, as set out in the verdict, "John William," and not "John Williams," as in the indictment, and elsewhere in the record, it is written. There is no intimation anywhere in the record that any but the one defendant was charged with the theft, or pleaded to the charge, or was testified to by the witnesses, or whose trial was had before the court and jury; or that John Williams was not the person tried and found guilty by the jury, and so adjudged by the court. The question, then, is, Does the omission of the letter "s," under the circumstances above set out, vitiate the verdict?

In the first place, we are of opinion that in cases like the present, when but one defendant is placed on trial, there can be no necessity for naming the defendant at all in the verdict. It would be sufficient in such a case for the jury to say in their verdict they *find the defendant guilty or not guilty*, as they in their retirement may determine, without naming the defendant; and it would be the same thing when more than one were placed on trial together, under the same plea, and the finding of the jury be the same as to all the defendants on trial.

If, however, more than one should be jointly tried, and the jury should determine to find a verdict as to one or more, differing from the verdict as to another or others on trial, it would in that event become necessary for the jury to name each defendant to whom a finding applies, to avoid confusion and render certain the finding of the jury as to

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each defendant. But none of these questions are involved in the present case. It is conceded that if the jury say by their verdict that they find one person guilty, naming him, such verdict would be worthless as to another, and could not be the basis of a judgment of conviction and the infliction of punishment. When it is important that a name be stated in judicial proceedings, or a name becomes important to the administration of the law, the name must be correctly stated. If greater particularity is required in any one case than in another, it seems that it would be in stating the name of the party injured. Still, we do not understand that the law requires that the name must be written in conformity to any rule of orthography. In fact, it is said that there is no general rule of the kind applicable to proper names. If the sound of the letters gives the pronunciation, or be, as expressed in the books, *idem sonans*, the demands of the law are satisfied. It is well settled that in the employment of names of common derivation even less particularity is required.

Mr. Chitty, in his treatise on criminal law, treating as to the name in the indictment (vol. 1, pp. 202, 203), says: "The name * * * of the party indicted ought, regularly, to be truly inserted in every indictment. * * * It seems, however, if the sound of the name is not affected by the misspelling the error will not be material" (citing numerous authorities). The same author proceeds: "And if two names are, in original derivation, the same, and are taken promiscuously in use, though they differ in sound, yet there is no variance."

Mr. Bishop, after making the above quotation from Chitty, says: "This proposition comes from the fact that when one hears a particular form of a name spoken, or sees it written, his memory is impressed likewise with the other, and he employs the one or the other according to feeling or convenience, just as he does any other synony-

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mous term in the language.” 1 Bishop’s Cr. Proc., sec. 689, where see examples of names having a common derivation.

The same writer, treating of orthography and the same sound (1 Cr. Proc., sec. 688), says: “The law does not take notice of orthography; therefore, if a name is misspelled, no harm to the prosecution can come of this, provided the name as written in the indictment is *idem sonans*, as the books express it, with the true name. It is sometimes a nice matter to determine when the names are of the same sound; and the courts do not, in this matter, hold the rule of identity with a strict hand.” The writer then proceeds to give examples of names which have been held to be *idem sonans*, and among them refers in a note to *The State v. House*, Busb. 410, not now accessible, where it was held that *Michael* and *Michaels* were so.

This example is in principle identical with the objection we are now considering to the verdict. In that case, as in this, the difference in the two names consists in using the final letter “s” in one and omitting it in the other; and, for aught that we can discover, the employment or the omission of the final letter makes no greater variation in the sound than the same omission does in *Michael*. John William is to our minds as much like John Williams in sound as *Michael* is like *Michaels*. On these and similar authorities this court held, in *Goode v. The State*, 2 Texas Ct. App. 520, that as a Christian name *Mary Etta* and *Marietta* are *idem sonans*. See also *Foster v. The State*, 1 Texas Ct. App. 531, where, citing 1 Whart. Cr. Law, sec. 256, it is said a variance or omission in the name of the person injured by the commission of the offence is much more serious than a mistake in the name of the defendant in an indictment, for reasons there stated. This is not such a case, however; and there the point of omission is not decided.

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This exception to the verdict cannot be sustained. The verdict clearly finds the defendant guilty. There was no necessity for the jury to state the name of the defendant in their verdict; and, in stating it, the apparently clerical omission of the letter "s" in writing his name does not vitiate their finding.

As to the second objection, that the verdict does not state where the defendant shall be confined, the law prescribes that the verdict must be general, and when there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such special pleas are either true or untrue; and "when the plea is not guilty, they must find that the defendant is either 'guilty' or 'not guilty,' and, in addition thereto, they shall assess the punishment in all cases, when the same is not absolutely fixed by law to some particular penalty." Code Cr. Proc., art. 626 (Pasc. Dig., art. 3091). In the present case there were no special pleas. The accused pleaded *not guilty*.

Under the article of the Code quoted above, and under the state of case as shown by the record, it became the duty of the jury to find by a general verdict whether the accused was *guilty* or *not guilty*. This was their first duty; and having performed the primary duty of finding a general verdict that the defendant was guilty as charged in the indictment, it then became incumbent on them to perform the second duty under the law, rendered necessary in consequence of the first, *i. e.*, to assess the punishment. *Slaughter v. The State*, 24 Texas, 410. That not being absolutely fixed by law to any *particular penalty*, other than by "confinement in the penitentiary not less than five nor more than fifteen years," the jury in the present case, the charge being theft of a gelding, were required, in the language of the Code, to assess the punishment in accordance with the law, and within the limits prescribed by the law. Penal Code, art. 765 (Pasc. Dig., art. 2409).

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The jury performed their primary duty by determining that the accused was guilty of the crime charged in the indictment, and their second, or subsidiary duty, by assessing his punishment within the limits prescribed by the Code, in almost the very language of the law itself, at five years' *confinement* in the *penitentiary*, which fixes the duration and the place of confinement with all the particularity the law requires. The balance is supplied by article 23 of the Penal Code, which declares: "Whenever the penalty prescribed for an offence is imprisonment for a term of years in the penitentiary, imprisonment at hard labor is intended." Pasc. Dig., art. 1676.

The following rule is laid down in Graham and Waterman on New Trials (p. 159, vol. 1,) where, after discussing the subject of verdicts in civil cases, it is said: "It has long been well settled that the courts will give validity to verdicts when they perceive the substance of the issue to be contained in the verdict, however rudely or informally the finding of the jury may have been expressed. In the language of Chief Justice Hobert, 'the court will work the verdict into form and make it sense.' For verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice." This rule of construing verdicts has been quoted substantially and approved in *Lindsay v. The State*, 1 Texas Ct. App. 327, where the verdict was: "We, the jury, find the defendant guilty of the crime, and fix his punishment at five years in the penitentiary." The court said: "We believe this verdict is responsive to the charge in the indictment, and is such a finding as will support the judgment." See also *Bland v. The State*, 4 Texas Ct. App. 15, where the verdict was: "We, the jury, find the defendant guilty, and assess the *find* against defendant one hundred dollars."

Syllabus.

On the authority of Lindsay's case, citing Gra. & Wat. on New Tr. 159, and other authorities cited in the latter case, the verdict was sustained, upon the idea that it was evident from the context that in using the word *find*, in affixing the amount of punishment, the jury intended to use the word *fine*.

From these authorities we are of opinion that the verdict in the present case leaves no room for doubt; that the jury have clearly expressed an intention to find the accused guilty of the crime charged in the indictment, and to assess his punishment in the terms of the law.

The evidence being sufficient to warrant the jury in their finding, we are of opinion that the court did not err in refusing a new trial and entering judgment in accordance with the finding of the jury.

After a careful examination of the case as presented by the record, there being no appearance here by counsel for the appellant, we find no error in the proceedings below of which the appellant can complain, and the judgment is affirmed.

Affirmed.

5	234
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HOUSTON POWELL v. THE STATE.

1. PRACTICE. — In the trial of a criminal case, when the facts have been proved which constitute the offence, it devolves upon the accused to establish the facts on which he relies to excuse or justify his acts.
2. EVIDENCE — EXCEPTIONS. — A bill of exceptions to the exclusion of evidence should set out the evidence, in order that the court may be enabled to judge of its materiality.
3. SAME — DECLARATIONS. — In a trial for murder, it being in proof that the deceased was a school-teacher, and was killed in his school-house, the accused proposed to prove his own declarations of his purpose in going to the school-house, expressed by him on his way there. *Held*, that such declarations were not *res gestæ*, and were not evidence for the accused.
4. CHARGE OF THE COURT. — In a trial for murder, the court below gave in charge to the jury the statutory definitions of murder in both degrees,

Statement of the case.

and of manslaughter; explained malice, both express and implied; gave the accused the benefit of the reasonable doubt, and of such special instructions as he asked on the law of self-defence. Accused, being convicted of manslaughter, claims that the court below erred in giving any charge on the law of that offence, and insists that the proof made a case which was either murder or self-defence, and that he was prejudiced by the charge on manslaughter. But *held*, in view of the evidence, that the appellant has no cause to complain of the charge. A conviction will not be set aside because the court below gave to the accused the benefit of a charge on a less degree of offence than the jury would have been warranted in convicting him of; nor because the jury, in view of mitigating circumstances, were unwilling to convict for the greater offence.

APPEAL from the District Court of Gonzales. Tried below before the Hon. E. LEWIS.

The indictment was for the murder of John A. Smith, a school-master, and, as will be seen in the opinion, it impleaded three others besides the appellant. The conviction was for manslaughter.

It is disclosed by the evidence for the prosecution that the appellant, his brother James, John House, and William Burt, came to the deceased's school-house on the day of the killing, before school dismissed, and that, after the scholars had dispersed, firing was heard in the direction of the school-house. No one of the State's witnesses saw the shooting, but one saw the defendant's brother standing in the doorway of the school-house, and heard some one exclaim, "Give him h—l, boys!" None of the others heard this exclamation.

The witnesses Burt and House testified, for the defence, that they waited for defendant to see the deceased about whipping his brother, the day before, intending to accompany defendant home; that when defendant knocked at the school-house door, deceased told him to "come in;" to which defendant replied, "I want you to come out here." Deceased again invited defendant in, who, on entering, said to deceased, "I have come to see why you whipped my

Argument for the appellant.

brother so severely ;” to which deceased replied, “ I do not think I whipped him severely.” Defendant said, “ If you don’t think so, I will show you his back ;” and deceased answered, “ I do not want to see it.” Defendant then said, “ I believe the law will take hold of you for it, and I will prosecute you for it.” Deceased said, “ You had better do it now, then.” Defendant turned, facing the door, as though to go out, when deceased rose up and knocked him down with a chair. Defendant attempted to rise up, but when about half up deceased again knocked him down with the chair, when the firing commenced. Four shots were fired, only one of which was seen by witnesses, and that was from the neighborhood of the door.

Miller & Sayers, for the appellant. The State, after introducing its evidence, as shown by the statement of facts, rested, when defendant demurred to the evidence. The State joined issue on the demurrer to the evidence. If, then, after giving to the evidence any reasonable construction, it would not sustain a conviction, it was the duty of the court to sustain the demurrer. *Dangerfield v. Paschal*, 11 Texas, 581.

The evidence introduced by the State in this case failed to connect the defendant, Houston Powell, with the killing of Smith in any way whatever. It was shown that when the State’s witnesses left the school-house he was out on the play-ground, and he is not shown to have ever returned to the house ; nor is it shown that Smith was killed by the firing which was heard by the State’s witness ; nor, in fact, that Smith was killed until after dark of that day.

2. If it was not error to overrule the demurrer to the evidence, it certainly was error to permit the State’s counsel to comment on this ruling to the jury in his closing argument, as shown by the fifth exception, in violation of the rules of court, and by which the jury were led to believe that

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it was their duty to reject the testimony of defendant's witnesses, and that upon the testimony of the State's witnesses alone they were bound to find a verdict against defendant.

It was also apparent, from the former orders of the court discharging the defendants Burt and House, that there was other evidence by which the State could prove the facts in relation to the killing of Smith, and there was no reason why the defendant should have been required to make his defence until the State had made out a case against him, or had exhausted the evidence within its reach.

The fact that the defendant was, by this ruling of the court, compelled to introduce these witnesses, instead of the State, worked a serious injury to defendant; because, as shown by bill of exceptions, the State's counsel, in his closing argument, charged that there was a conspiracy between the defendant and these witnesses to take the life of the deceased, and thereby to induce the jury to disregard their evidence, and, in connection with the ruling on the demurrer, to lead the jury to believe they must convict on the evidence of the State's witnesses, as the judge had decided that it was sufficient, and defendant could not deny it.

The second error assigned is, that the court erred in refusing to permit the witness House to state what was said by defendant in relation to their object in going to the school-house, while on the way. This, we submit, was a part of the *res gestæ*, and was relevant for the purpose of showing their intent in going there, and ought to have been admitted.

The third, fourth, and fifth errors assigned are for defects in the charge of the court. The charge is one of those general, stereotyped charges that might be given in every murder case in this State. It has no more reference to the facts in this case than to any other case, and fails to instruct the jury as to their duty in this particular case, and, therefore, does not comply with the requirements of the statute. *Sutton v. The State*, 41 Texas, 513; *Holden v. The State*,

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1 Texas Ct. App. 225 ; *O' Mealy v. The State*, 1 Texas Ct. App. 180.

The charge is also incorrect in asserting that malice is to be implied in all cases of homicide, and its existence is to be presumed, etc. This we think clearly wrong, as an abstract proposition ; but when applied to the facts in evidence in this case, it is not only wrong, but is a direction to the jury to presume that there was malice, when every legal deduction from the evidence shows that the killing was not done upon any malice, but in self-defence.

While " malice " is a state of mind, yet it must be proved, or at least the external acts indicating this state of mind must be clearly established, — as, that the killing was done in a manner indicating a want of excuse for it.

This case, as developed by the evidence, was either a case of justifiable homicide or a case of murder. If the jury were at all warranted in rejecting the evidence of defendant's witnesses, then upon the evidence of the State's witnesses the defendant was guilty of murder or nothing. If the testimony of defendant's witnesses is taken into an account, it shows a case of justifiable homicide. Then, we think that the charge in reference to manslaughter was erroneous, and should not have been given.

It was held by this court, in *Williams v. The State*, 2 Texas Ct. App. 271, that when the proof showed that a case was either one of murder or of justifiable homicide, it would be erroneous for the district judge to charge upon manslaughter, as such a charge would be calculated to confuse and mislead the jury. See also *Pugh v. The State*, 2 Texas Ct. App. 539, and cases there cited.

While it is true that in these cases the objection was made by the defendant that the court did not give him the benefit of a charge upon manslaughter, yet that cannot change the law. The statute requires the court to charge the law applicable to the case, — no more and no less, —

Argument for the appellant.

and when either more or less than the very law applicable to the case is given as a charge by the district judge, can this court say that the defendant was not injured by it? He has not been tried according to the law of the land, as he had a right to be tried. It may be that the jury, under the instruction, have convicted the defendant of the minor offence, when they would have acquitted him of any greater one.

The bill of exceptions shows that the rules of practice were repeatedly and wantonly violated by the State's counsel on the trial of this case, in matters most material and essential to a fair hearing of his cause before the jury. These rules provide that the violation of them may be reserved by bill of exception, may be made the basis of a motion for a new trial, and may be assigned for error.

Now, if it was not intended that a palpable violation of these rules should be sufficient ground to reverse a cause, then they are all bombast and fustian, and had better be repealed. The rules were intended to secure a fair and impartial presentation of a cause before the court and jury, and the violations shown by defendant's bill of exceptions were those which directly involve the fairness of the presentation of his cause to the jury, and may in some measure account for the verdict.

All these errors were made part of the motion for a new trial, and we assign for error the overruling of the motion for new trial, and will only discuss one of the grounds in the motion, and that is that there was no evidence to sustain the verdict.

The testimony of the State's witnesses proved nothing against defendant, Houston Powell. The evidence of defendant's witnesses showed a clear case of justifiable homicide. There was no conflict in the evidence,—nothing to reconcile, no impeached or disputed evidence,—in fact, nothing upon which to predicate a quibble as to the credibility

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of the defendant's witnesses, except the fact that they had been jointly indicted with the other defendants for this offence. But, to offset this, there is the solemn statement of the State's counsel, in the record, that there is no case against them. The verdict, therefore, can only be accounted for upon the general principle that seems now to obtain, viz.: that it is the duty of the petit jury to convict in all cases, and the duty of the district judge to uphold their decision.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant, Houston Powell, was jointly indicted with James Powell, John House, and William Burt, in the District Court of Gonzales County, on October 1, 1875, for the murder of one John A. Smith, on June 10, 1875. On the application of the county attorney, a *nolle prosequi* was entered in the case as to the defendant William Burt, at the October term, 1877, of the court.

At the same term, on the application of James and Houston Powell, a severance was granted them, and the defendant John House was placed upon trial. After hearing the evidence, on motion of the county attorney, the court entered a *nolle prosequi* as to the defendant House. At the April term, 1878, of said court, James Powell asked for a severance from his co-defendant, Houston Powell, which was granted; and Houston Powell was placed on trial, found guilty of manslaughter, and his punishment assessed at five years' confinement in the penitentiary, and the case was appealed to this court.

The appellant has assigned the following errors, to wit:

“ 1. The court erred in overruling defendant's demurrer to the evidence, as shown by the statement of facts and bill of exceptions, for reasons shown in bill of exceptions.

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“ 2. The court erred in refusing to permit the witness John House to state what was said by defendants, Houston Powell and James Powell, on their way to the school-house, in relation to their object in going to the school-house, as shown by the exceptions reserved in the statement of facts.

“ 3. The court erred in the instructions given to the jury, in this: that the charge is of such a general character that it might be given in any case where defendant was indicted for murder, and has no special reference to the case on trial, and does not instruct the jury as to this particular case.

“ 4. The charge is also incorrect in asserting that malice is to be implied in all cases of homicide, and its existence is always to be presumed till the facts developed by the evidence show the killing to have been done in sudden passion. This part of the charge was not correct in law, and, as applied to the facts in this case, was well calculated to, and evidently did, mislead the jury.

“ 5. The court erred in instructing the jury in reference to the offence of manslaughter, and in charging them that, under the evidence, they could find the defendant guilty of manslaughter, for reasons shown in defendant's bill of exceptions.

“ 6. The court erred in permitting the State's counsel, in the closing argument, to violate the rules of practice prescribed for the District Court, as shown by defendant's bill of exceptions, the same being exceptions numbered 2, 3, 4, and 5 in said bill of exceptions.

“ 7. The court erred in overruling defendant's motion for new trial, for reasons stated therein.”

The District Court properly overruled appellant's demurrer to the evidence. After the counsel for the prosecution had examined a number of witnesses, he announced that he was through with the evidence on the part of the State for the present. Counsel for the appellant demurred to the

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evidence introduced by the State, which demurrer was overruled by the court. On the trial of any criminal cause, when the facts have been proved which constitute the offence, it devolves upon the accused to establish the facts on which he relies to excuse or justify his acts. Pasc. Dig., art. 1655. The evidence introduced by the State proved that Smith had been killed, in the County of Gonzales, about the time charged in the indictment; and the evidence, although circumstantial, was sufficient to sustain the ruling of the court on the demurrer to the evidence.

After the court overruled the demurrer to the evidence, appellant introduced such witnesses as he desired to examine, and when the evidence was closed the case was submitted to the jury, under instructions from the court. Simply because the county attorney, who, by permission of the court, had entered a *nolle prosequi* as to the defendants William Burt and John House (both of whom had been jointly indicted with appellant, and were competent witnesses), for reasons best known to himself, concluded not to call them as witnesses for the State, is not a matter subject to revision on appeal. Burt and House were both placed upon the stand as witnesses for the appellant, and were examined fully as to the homicide. The appellant got the full benefit of their evidence, and the prosecution is not to blame because appellant saw proper to introduce them as witnesses for the defence.

The next point raised by the bill of exceptions presents the question whether the court committed an error in refusing to permit the witness House to state to the jury what was said to him by James and Houston Powell as to their object in going to the school-house, at any time after he came up with them on their way to the school-house, and prior to the killing of Smith. The county attorney objected to the admission of this evidence, and his objection was sustained by the court. The appellant should have set out in

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his bill of exceptions the fact expected to be elicited from the witness, so as to enable this court to determine its materiality. The evidence was properly excluded. The statements called for were declarations of appellant and James Powell, not made at the time of the killing, and therefore no part of the *res gestæ*. The admission of such statements would be to allow defendants to manufacture testimony in their own behalf. *Harmon v. The State*, 3 Texas Ct. App. 51; *Robinson v. The State*, 3 Texas Ct. App. 256; *Ray v. The State*, 4 Texas Ct. App. 450.

The third, fourth, and fifth errors assigned refer to the charge of the court. It is shown by the statement of facts that John A. Smith, at the time of his death, was teaching school in Gonzales County; that James Powell and Houston Powell are brothers. James Powell, on account of some disagreement between him and his father, was living with his brother Houston, with the approbation of his father, and was a pupil of the school taught by Smith. He was at school on the day before Smith was killed, and was severely punished by his teacher for disobeying the rules of the school. On the next day, between the twelve o'clock and afternoon recess, Houston Powell, James Powell, and John House rode up to the school together, hitched their horses, and got down. They stayed out in the play-ground until recess, when they mixed with the scholars. A pistol was seen upon the person of Houston Powell. When the school was dismissed for the day, Smith remained in the school-house; the others who were there (except the parties indicted in this case) left. Soon afterwards four shots were heard in or about the school-house, and Smith was killed. His dead body was found in the school-house. There were two wounds on his body. One of them had entered from the front, near the heart, and passed through, coming out under the shoulder-blade; the other had struck the head from behind, striking the left side of the protuberance at the

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juncture of the skull and the spinal column, and passed out on the right side of this protuberance, passing into the head from one to two inches. These wounds were made by pistol or rifle balls. There was but one door to the school-house, and that was in the west end. The dead body was lying about ten feet from the east end of the house, and nearer to the north side.

The theory of the defence is that the killing was in self-defence ; that appellant, on the day of the homicide, went to the school-house on a lawful and peaceable mission, to see the teacher in regard to the whipping inflicted by him on James Powell, the day before ; and that while appellant was there, conducting himself in a lawful manner, the deceased made a violent assault upon him with a chair ; and that if appellant, or another person interfering in his behalf, killed the deceased, it was done to save the life of defendant, or to save him from serious bodily injury.

The court charged the jury on murder in the first degree, murder in the second degree, and manslaughter, defined these offences in the language of the statute, and gave the jury the legal signification of the terms “ express malice ” and “ implied malice.” The court further charged the jury on the law of a reasonable doubt, not only upon the general question of the guilt or innocence of the accused, but also as between the different degrees of the offences named in the charge, so as to accord him the full benefit of such a doubt as between the degrees.

The following special instructions were asked by the defendant, viz. :

“ 1. The jury are instructed that a citizen of this State has a right to defend his person against any unlawful assault, and if the assault be such as to induce a reasonable fear of death or serious bodily injury, he would have the right to kill his assailant, if necessary to his defence ; and if you believe from the evidence that the

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defendant, or some one interfering in his behalf, killed the deceased while engaged in making such dangerous attack upon defendant, you will acquit him.

“ 2. If the jury believe from the evidence that the defendant was conducting himself in a lawful and peaceable manner, and, while so doing, the deceased made a violent and dangerous assault upon him, and in defending himself against such unlawful and violent assault the defendant, or some other person interfering in his behalf, killed the deceased, you will acquit the defendant.

“ 3. The State must prove the guilt of the defendant by the witnesses upon the stand, and you cannot presume any fact necessary to such conviction, but must presume the defendant to be innocent until his guilt is shown by the evidence, beyond a reasonable doubt.

“ 4. The jury are instructed that, in order to constitute the crime of murder in the first degree, there must not only be a grudge, ill-feeling, or, as the law terms it, ‘malice,’ but the fact must be shown that, by reason of the ill-feeling, or malice, the defendant deliberately determined to kill the deceased, and then carried that determination into execution.”

The court gave all the special instructions asked by the appellant. We believe the charge of the court, taken as a whole, was sufficiently specific, and was a compliance with the requirement of the statute in this respect. Pasc. Dig., art. 3059.

The defendant excepted to all that part of the charge which defines the offence of manslaughter and directs the jury that they may find the defendant guilty of that offence, and defining the punishment therefor, for the reason that said charge was not the law of the case, was not warranted by the evidence, and was calculated to mislead the jury. It is insisted by appellant's counsel, both in their brief and oral argument, that the case, as developed by the evidence,

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was either a case of justifiable homicide or one of murder; that if the jury were at all warranted in rejecting the evidence of the State's witnesses, the defendant was guilty of murder or nothing; and that if the testimony of appellant's witnesses is taken into consideration, it shows a case of justifiable homicide; and, therefore, that the charge in reference to manslaughter was erroneous, and should not have been given.

It has frequently been held by this court that when the proof shows a case either of murder or justifiable homicide, it would be erroneous for the district judge to charge upon manslaughter, and that his refusal to give an instruction on manslaughter, when asked in such case, would not be a good ground for reversal of the judgment. And this ruling is sustained by abundant authority. This court has never held, and the learned counsel for appellant have cited no case where it has been decided, that a judgment should be reversed because the court gave the defendant the benefit of a charge on a less offence than the evidence showed he was guilty of. There is an admitted distinction between murder in the second degree and manslaughter, in this State. In the one, malice is a necessary ingredient; in the other, it is wanting. In one, the crime is attributed to a wicked, depraved, malignant spirit; in the other, it is imputed by the benignity of the law to human infirmity. If, for instance, one person intentionally kills another suddenly, in the heat of passion, without any legal provocation sufficient to reduce the homicide to manslaughter, or to justify or excuse the killing, the offence is murder in the second degree. On the other hand, if death ensues from a sudden transport of passion or heat of blood, upon a sufficient provocation, it is considered as amounting only to manslaughter.

This being the case, to draw an unerring line, pointing with undeviating certainty to the grade of the offence committed, upon a given state of facts, in all cases, would baffle

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the skill of the most eminent jurist ; and an attempt to do this would often defeat the ends of justice. The fact that the jury, after finding the defendant guilty of manslaughter, assessed the highest penalty affixed to that offence, satisfies us that the defendant was not injured by that part of the charge on manslaughter which was excepted to by appellant. Courts are not disposed to disturb verdicts because the charge was too favorable to the defendant, or because juries, in consequence of mitigating circumstances in the evidence, are unwilling to expose defendants to the full penalties of the law. The charge of the court sufficiently defined the offence of manslaughter.

It is contended that counsel for the prosecution violated certain rules of practice in his closing speech to the jury, and that too much latitude was allowed him by the court in this regard, over the objections of appellant. These errors are specifically set out in a bill of exceptions. It is the duty of the presiding judge to see that counsel confine their argument to the evidence and to the argument of opposing counsel. The presiding judge has some discretion in such cases ; and we must give the jury credit for some common sense, and believe that they will look to the charge of the court, rather than to the statement of counsel, for the law. In this case it does not appear that any legal right of the appellant was invaded.

After a careful examination of the entire record, we believe that appellant had an impartial trial, and was well defended, and we see nothing that would authorize us to reverse the judgment. It is, therefore, affirmed.

Affirmed.

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30 429

ELIJAH BREWER v. THE STATE.

1. **INFORMATION.** — If an information charges the offence in the language of the statute it is sufficient, as a general rule. The exception to this rule is when the statute uses generic terms, in which case it is necessary to state the species, according to the truth of the case; and when the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it.
2. **VARIANCE.** — An indictment must show that the offence was committed some time anterior to its filing, and that it does not appear to be barred by limitation. In this case the offence is alleged to have been committed in the year "*one thousand and seventy-eight*," a mistake, evidently, which might have been corrected at the proper time. But *held*, that the variance between the complaint and information is fatal.

APPEAL from the County Court of Denton. Tried below before the Hon. T. E. Hogg, County Judge.

No brief for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The appellant, by motion in arrest of judgment, which was overruled in the court below, calls in question the sufficiency of the information upon which he was tried and convicted.

The charge in the information is that the accused, "with force and arms, in the county of Denton, and State aforesaid, did unlawfully break, pull, cut down, and injure a certain fence, then and there the property of Amanda C. Yates, and then and there in the possession of Cicero Cullin, without the consent of her, the said Amanda C. Yates;" against, etc.

The information is based upon the first section of the act of April, 1873 (Gen. Laws 1873, p. 41), which is as follows: "That hereafter it shall be unlawful for any person

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or persons to break, pull down, or injure the fence or fences of another, without the consent of the owner, or person in possession thereof." The object of the act of which the above extract is a part, as declared in the title, is "to better provide for the protection of agricultural interests."

We have not been favored with the views entertained by counsel for the appellant as to what particular portion, or in what respect, the information is deemed defective, any further than as set out in the motion in arrest of judgment, and have only the record to guide us in passing upon its sufficiency. It is a general rule, well settled by numerous authorities and adjudications, that in indictments for offences created by statute it is sufficient to follow the exact words of the statute in describing the offence.

The exception to this rule, it was said in *The State v. West*, 10 Texas, 553, on the authority of Archbold's Criminal Practice and Pleading, and *Bush v. The Republic*, 1 Texas, 455, 608, is "where the statute uses generic terms, in which case it is necessary to state the species, according to the truth of the case; and when the subject of the indictment cannot be brought within the meaning of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it." Another general rule is, that "when an evil intent, accompanying an act, is necessary to constitute such act a crime, the intent must be alleged in the indictment, and be proved. But when the act is in itself unlawful, an evil intent will be presumed, and need not be averred; and, if averred, it is a mere form of allegation, which need not be proved by extrinsic evidence." *The State v. West*, 10 Texas, 553; Chitty's Cr. Law, 234.

In West's case the indictment contained two counts; one charged the cutting of a tree, the other the moving of a stake, described as allowed landmarks of a certain tract of land described in the indictment. In the description of the

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offence the indictment followed the words of the statute. The indictment was questioned in the District Court, on the ground that it "does not allege that the stake or corner-tree was marked as a corner-tree or boundary-line, or that the defendant knew them to be such corner or boundary-line." It was held "the case does not come within these exceptions to the general rule," and that it was sufficient, in describing the offence, to pursue the words of the statute enacting it; and that the indictment was sufficient to put the accused upon his defence.

In *Welsh v. The State*, 11 Texas, 368, where the indictment charged the accused with cutting down and carrying away trees upon the land of William Taylor, without first having the consent of William Taylor, it was held sufficient in the indictment to follow the statute, and West's case was cited, and the ruling therein affirmed; and both Welsh's and West's cases were again cited, and the rulings again affirmed, in *The State v. Warren*, 13 Texas, 45.

We are aware that forcible trespass has been classed as being analogous to riots and kindred offences, and that it has been said that any actual, or even attempted violence, of the legal standard in magnitude, creating a perturbation in the public repose, is indictable at common law, and that these common-law offences have been by statutes confirmed, and in some respects extended, in several of the States. Bishop's Stat. Cr., sec. 541. But we are of opinion that the offence enacted by the statute under which this prosecution is had does not belong to that class of offences, at least in analogy to offences calculated to lead to breaches of the peace, and that it does not require the same degree of particularity in charging the offences, it being the declared object of the statute to *better provide for the protection of agricultural interests*; and that, whether a prosecution be by indictment or information, it would be sufficient to charge an offence, under the act in question, as it is set

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out in the statute, and that no greater particularity is required.

There is, however, a fatal defect in the information in another respect. There is a material variance between the complaint and the information. The information charges an offence as having been committed in the year "*one thousand and seventy-eight*." This is, doubtless, a mistake. If so, it could have been corrected at the proper time; but it is now too late. We must try the case upon the record as we find it. One requisite of an information is, "that the time of the commission of the offence be some date anterior to the filing of the information, and that the offence does not appear to be barred by limitation." Code Cr. Proc., art. 403, subdiv. 6 (Pasc. Dig., art. 2870); *Collins v. The State*, decided at the present term, and authorities there cited, *ante*, p. 37.

Because of a fatal defect in the information, the judgment is reversed and the prosecution is dismissed.

Reversed and dismissed.

JOHN W. FORE v. THE STATE.

1. **THEFT.** — The possession and ownership of the property stolen need not necessarily be in the same person in order to constitute theft. And where one has the general and another the special property in the thing stolen, the ownership may be alleged in either.
2. **EVIDENCE** must correspond with the allegations, and be confined to the points in issue.
3. **SAME.** — Evidence which merely tends to connect the accused with other offences, distinct from that for which he is on trial, must be excluded. The exceptions to this general rule are confined to cases which relate to *knowledge* or *intent* of the party as to some material fact which, though apparently collateral, had some bearing on the main fact.
4. **SAME.** — It is for the court to determine whether or not evidence offered is competent as throwing light upon the issue, or tending to establish guilt or innocence; and if competent, to admit it to be considered by the jury

5	251
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as other testimony in the case; otherwise, to exclude it. This duty of the court should not be transferred to the jury.

5. *SAME.* — It was error, in a trial for theft, to admit evidence of the extradition of the accused from the republic of Mexico, on a charge of assault with intent to murder.

APPEAL from the District Court of Kinney. Tried below before the Hon. T. M. PASCHAL.

The case is disclosed in the opinion of the court.

No brief for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was indicted, tried, and convicted, at the May term of the District Court of Kinney County, for the theft of a gelding, and his punishment assessed at confinement in the penitentiary for the term of fifteen years. The indictment charges that the animal stolen was the property of one H. C. Griner, and that the same was fraudulently taken from his possession, without his consent, etc.

The evidence shows that the gelding, at the time he was taken, was the property of H. C. Griner, and in the possession of the witness James McLymont, the agent of Griner, who was holding the same for the owner, and was taken without the consent of McLymont.

We do not believe the court erred in overruling the objection of defendant to that portion of the testimony of the witness McLymont as to the possession of the gelding, and the want of his consent to any appropriation or taking of said gelding. It is not necessary, in order to constitute theft, that the possession and ownership of the property be in the same person at the time of the taking. When one has the general and another the special property in the

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thing stolen, the ownership may be alleged to be in either. In this case, the possession of McLymont was the possession of Griner, and evidence that the gelding was taken from the possession of McLymont, and without his consent, was properly admitted. Pasc. Dig., art. 2386; *Cox v. The State*, 43 Texas, 101; *Moseley v. The State*, 42 Texas, 78; *Samora v. The State*, 4 Texas Ct. App. 512; *Jenks v. The State*, ante, p. 68; 2 Whart. Cr. Law, sec. 1824.

The District Court committed an error, for which this case must be reversed, in admitting testimony, over the objections of the defendant, in regard to other and distinct offences, which were in no way connected with the offence charged in the indictment. The court improperly allowed the witnesses McLymont, Lambert, and Hagerty to testify in relation to a written order purporting to be drawn on one James Cornell for \$32, which order the witness McLymont testified had been forged by the defendant, and presented by him at the store of Cornell, and that defendant had received in money and goods the full amount called for in the order, from the clerk of Cornell, on the day when said gelding was stolen.

The production of evidence to the jury is governed by certain rules. The first of these is that the evidence must correspond with the allegations, and be confined to the point in issue. As a general rule, evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, is excluded; and the reason is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, or to mislead them; and, moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it.

Mr. Wharton says: "The general rule on the subject of permitting testimony to be given of matters not alleged is, that nothing shall be given in evidence which does not

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directly tend to the proof or disproof of the matter in issue. Evidence of a distinct, substantive offence cannot be admitted in support of another offence; *a fortiori*, evidence of an intention to commit another offence cannot be admitted.” 1 Whart. Cr. Law, 647.

Mr. Bishop says: “It is not permissible, as a general rule, to show that the defendant has committed other crimes of the same kind as the one for which he is being tried, — as, for instance, if he is being tried for larceny, to show that he has committed, at other times and places, other distinct larcenies. * * * Much less is it permissible to show a different sort of crime committed by the prisoner.” Bishop’s Cr. Proc., sec. 1064. On trial of a defendant under an indictment for burglary, evidence of the manufacture by him of the burglarious instruments by which another burglary was committed was held inadmissible. *The Commonwealth v. Wilson*, 2 Cush. 590. See also *Walker v. The Commonwealth*, 1 Leigh, 574; *Brock v. The State*, 26 Ala. —; *Barton v. The State*, 18 Ohio, 221; *Cole v. The Commonwealth*, 5 Gratt. 696; *The State v. Martin*, 34 Miss. 85.

As was said by this court in the case of *Persons v. The State*, 3 Texas App. 240, “exceptions to this rule may be found. But these exceptions will be found to have been in cases which relate to *knowledge* or *intent* of the party as to some material fact which, though apparently collateral, had some bearing on the main fact.” See also 1 Greenl. on Ev. 53; *Gilbraith v. The State*, 41 Texas, 567; *Cesure v. The State*, 1 Texas Ct. App. 19.

We cannot see that the evidence in regard to the written order, which was admitted by the court over the objections of defendant, tended in the remotest degree to prove the defendant guilty of the offence charged. It related to an entirely distinct offence, committed at a different time, and was well calculated to prejudice defendant’s case before the

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jury, and to excite prejudice in their minds, and mislead them.

The court below also erred, for the same reasons, in admitting the evidence of McLymont about his saddle, bridle, blanket, and other articles, which he testifies were stolen from his camp. If any of these missing articles had been subsequently seen in the possession of the defendant, that fact would be proper evidence as a link in the chain of circumstances tending to connect the defendant with the theft of the gelding stolen at the same time. There is no proof in the statement of facts that any of the articles mentioned by the witness McLymont were seen in the possession of defendant after they were stolen.

The court, in the seventh paragraph of the charge to the jury, instructed them as follows: That "proof of other offences committed at the same time and place as that for which defendant is charged are admissible as evidence if they serve to explain or throw any light upon the charge in the indictment, and to this extent only can they be considered; but if they do not throw any light upon the transaction in question they should be discarded by you, for without this connection they cannot raise any presumption of guilt or prejudice against the defendant in your consideration of the case at bar."

This instruction did not relieve the testimony of its objectionable features. It was for the court to decide whether or not it was proper evidence to go to a jury, or whether it would serve to throw light upon or tend to establish the guilt of the accused. If so, then it was proper testimony to go to the jury, to be considered by them like the other evidence in the case. If it was not of this character of evidence, then the objections of defendant to its admission should have been sustained.

The court also erred in allowing the witness Winders to testify that defendant was extradited from the republic of

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Mexico on a charge of an assault with intent to murder. The questions we have been considering on this character of testimony are presented by bills of exception. There are other errors raised in defendant's motion for new trial. They are such, however, as may not likely occur on another trial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

PEDRO RODRIGUEZ, *alias* POLONIO BALDERAS, v. THE
STATE.

1. **MURDER—CIRCUMSTANTIAL EVIDENCE.**—To warrant a conviction on circumstantial evidence, each fact necessary to the conclusion of guilt must be proved by competent evidence, beyond a reasonable doubt; all the facts must be consistent with each other and with the main fact to be proved; and the circumstances, taken together, must be of a conclusive nature, leading to a satisfactory conclusion, and producing a reasonable and moral certainty that the accused, and no other, committed the offence; and these circumstances should not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion or reasonable hypothesis consistent with the facts proven. Note such evidence held insufficient to sustain a conviction for murder in the second degree.
2. **EVIDENCE.**—The rule excludes such evidence as implies that better evidence exists, and is withheld or not accounted for, but does not demand the *greatest amount* procurable.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. NOONAN.

Under an indictment for the murder of Dimas Muños, on April 9, 1878, in Bexar County, the appellant was convicted of murder in the second degree, and his punishment assessed at twenty years in the penitentiary. The conviction was had upon purely circumstantial evidence, a *résumé* of which is given below.

S. A. Purinton, for the State, testified that he is a sheep-

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raiser, residing at Cuilibre Springs, in Bexar County, and, as such, had deceased in his employ as a herder at the time of his death. Deceased slept at night in a tent, about one and a-half miles from the road which, passing witness's house, leads off from the main Bandera Road to Castroville. The last time witness saw deceased alive was on or about April 1, 1878. Defendant came to witness's house on April 4, and said that deceased had sent him to witness for a horse to ride to San Antonio, to see his (the deceased's) wife, who was sick. Louis Sanchez interpreted for defendant and the witness. In the evening of the same day, defendant brought the horse back, saying that deceased could not ride to San Antonio, as he had a stiff knee, from rheumatism. On the morning of the next day, the 5th, defendant came to witness's house, and, through the same interpreter, said that the deceased had sent defendant to witness for \$4 of his wages, to send to his (deceased's) wife, in San Antonio. Witness rather suspected something wrong; but defendant, being with Sanchez, induced him to give him the \$4. Deceased had worked for witness for some time, and had never been seen by witness with arms.

On April 11, 1878, witness, discovering the herd of sheep of which deceased had charge grazing towards his house, went out to meet them, supposing that deceased wanted something. He found no herder with them, though he called; and then galloped over to the tent of deceased, where he found him dead, and his body in a state of decomposition. An abrasion or wound back of the right ear had been fly-blown, and was infested by maggots.

On cross-examination, the witness says that defendant was at his house on the 4th and 5th days of April, as detailed above. The road passing witness's house is not the main Castroville or Bandera Road, but one connecting them, and people pass on it frequently, but witness does not

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remember seeing any one passing on it between the 5th and 11th of last April. There are also in the neighborhood some hay-roads, and a road used by neighbors, the latter of which is sometimes travelled by people. Witness sometimes has visitors, but can recall no other one at his house between the 5th and 11th of April than defendant. Has four sheep-herders in his employ, three of whom, at the time of the killing, were herding near his house. Witness examined the body of deceased, and found four—it might have been six—bullet wounds in his body. The body was much decayed, swollen, and offensive to smell.

Louis Sanchez, for the State, swears that he saw defendant on the two days he came to Purinton's house, and interpreted for the two. Defendant came the first day for a horse, as he said, at the instance of deceased, and for the use of deceased; and came the next day, he said, at the instance of deceased, for \$4, for the family of deceased. Witness has never seen Ildefonso Rodriguez, that he knows of.

On cross-examination, he says that he never saw the defendant before he came to Purinton's the first time, for the horse. Doesn't recollect how long afterwards it was he came for the money. Witness saw deceased alive one day before defendant came to Purinton's house the first time, after which time he has never seen deceased alive.

Ildefonso Rodriguez, for the State, swears that about two months prior to the present term of court (June, 1878) he went with defendant to the other side of Cuiliebre Creek, stopping, the second night out, about one-half mile from the creek. In a few minutes the defendant got up and went off, leaving witness there, and telling him he would be back after a while. Witness went to sleep for about one-quarter of an hour. After a while he heard four shots, and presently defendant came in from the direction he went, bringing a tin-cup of water and a frying-pan of beans, cooked.

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He had none of these things when he went away. After the beans were eaten, defendant told witness they must go. Witness cannot say how far off the shots were. After defendant said they had to go, they went to the San Geronimo rock wall, four or five miles off. Nothing was said about the shots until witness asked defendant, as he was scared about them. Witness was told by defendant not to fear; that it was only some man firing his pistol. After witness and defendant left the San Geronimo, they went towards Fredericksburg. They intended to go to Bandera, but, after the shots, turned to Fredericksburg. Witness recognized a belt here shown him as one the defendant brought to his house in San Antonio, and that was worn by defendant on their trip. Witness saw a pistol in the belt during the trip; defendant had it the night of the shooting, and witness did not see that he left it at the camp when he went off, and came back with the beans. Would have seen it had it been left in camp. Witness is unable to state whether or not the pistol was loaded when the defendant went from camp, but thinks one cartridge was gone when he came back. Defendant stayed at the house of witness when in San Antonio; came from Monterey about six months before the shooting, and is not related to witness. When they camped on Cuiliebre Creek, the second night out (the night of the shooting), it was about seven o'clock. Witness heard the shots between ten and eleven o'clock.

Cross-examined, the witness said that the shots did not come from the direction taken by the defendant. Witness saw no horse-hunters, nor did defendant tell him that horse-hunters gave him the pan of beans. Witness had nothing but a small yellow sack when they started, and defendant nothing.

Phil Shardien, a detective, for the State, identified the belt as one he got at the house where defendant had stayed, and the last witness as the boy he saw there on that occa-

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sion. On cross-examination, he is not positive about the boy, but his size and appearance is the same.

Juana Esparza, mother of the witness Rodriguez, for the State, says that the defendant has been staying at her house, in San Antonio, when he returned from trips over the country. She has known the defendant for about a year. About five or six days before defendant was arrested, defendant and her son left her house, going she knew not where, nor for what purpose, and carrying nothing. Neither carried anything off, — that is, no blankets; no tin-cups, no frying-pan, no sacks, yellow or other color, — and brought none back. Defendant told witness when he got back that he had pawned a pistol at Carlos Guerguin's.

S. F. Miles, for the State, swears that he is half-owner with Purinton of the sheep stock spoken of. He saw defendant at the camp of deceased on the night of April 3d. Witness again saw defendant at Purinton's on April 4th and 5th, and details again, in substance, the testimony of Purinton and Sanchez. Defendant wore a six-shooter on each occasion, and witness examined it at Purinton's, and would know it. The belt looks like the one the defendant had on. On the night of the 3d, when witness saw defendant at the camp of deceased, he met him (defendant) coming out of the tent with deceased, when deceased told witness that here was a man who would herd for him while he (deceased) went to San Antonio. Witness knows the articles deceased had in his tent, as they were furnished by witness and his partner. He had a large frying-pan, two tin-cups, a coffee-pot, some knives and forks, and a small bag, with both ends closed and a slit opening in the middle. Witness saw the deceased alive on the evening of the 5th for the last time. When he went to gather up deceased's things, he found that all the beans, sugar, and coffee, one of the tin-cups, and the frying-pan were gone. The firing of a pistol could not be heard from the deceased's camp to Purinton's,

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on account of obstructing hills and timber. When deceased's body was removed, witness found one dollar and thirty cents in silver and a five-dollar currency bill, which he (witness) had paid deceased on March 14 preceding.

Ildefonso Rodriguez, recalled for the State, says that he pawned defendant's pistol for defendant, at Carlos Guerguin's, the morning of their return to San Antonio. Witness took no small yellow sack with him when he started, — only five cents and a small blanket. Again, he swears that he only carried a towel and bread, to which his mother had sworn.

S. A. Purinton, recalled, says that the money he paid defendant for deceased was four dollars, in American halves, and the money found under deceased was money paid him in March, — five in currency, one Mexican dollar, one quarter, and one nickel.

In behalf of the defendant, it was admitted that A. T. Beauregard would swear, if present, that he had known the defendant for five years, and had always known him as a peaceful, quiet, and industrious citizen.

No brief for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. Appellant in this case was indicted for the murder of Dimas Muños; was tried and convicted of murder in the second degree, and his punishment assessed at twenty years' imprisonment in the State penitentiary. Many interesting questions were raised during the progress of the trial, a discussion of which is not deemed necessary to a decision of the case on this appeal, and which are not likely to arise on a subsequent trial.

To our minds, the only important question to be consid-

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ered is whether the evidence, as shown by the statement of facts in the record, is sufficient to uphold the verdict and judgment. Directing our attention principally to a solution of this question, we have sifted out and arranged, in regular and connected order of detail, all the inculpatory facts involving this defendant in the murder, as charged in the indictment to have been committed by him, and then have applied to these facts the law applicable to the case as thus made.

The case is one entirely of circumstantial evidence. The doctrine with regard to the conclusiveness and effect of this character of testimony seems now to be well settled in this State. In *Hampton v. The State*, 1 Texas Ct. App. 652, this court quoted, with approval, the rule laid down in *The Commonwealth v. Webster*, 5 Cush. 296, as follows:

“In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt; all the facts must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, and leading, upon the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offence charged.” 3 Greenl. on Ev., sec. 29, and note.

In *Williams v. The State*, 41 Texas, 209, our Supreme Court held that, “to authorize a conviction on circumstantial evidence, the circumstances should not only be consistent with the prisoner’s guilt, but inconsistent with any other rational conclusion or reasonable hypothesis consistent with the facts proven.”

We do not believe that the evidence, as disclosed in the record before us, brings this case up to the standard of the rules thus laid down. It lacks such a satisfactory conclu-

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siveness and moral certainty of the guilt of the defendant “as would render it safe to allow the verdict to stand and become a precedent in the adjudication of offences under the law.” *Tollet v. The State*, 44 Texas, 95 ; *King v. The State*, 4 Texas Ct. App. 256 ; *Jones v. The State*, 4 Texas Ct. App. 437.

Besides this objection to the testimony, the evidence adduced to establish some of the main facts in the case presupposes the existence of other and better evidence of those facts, which should have been produced, or a failure to do so reasonably accounted for. *Porter v. The State*, 1 Texas Ct. App. 394. As an instance illustrating this objection to the evidence, we see that it is shown that accused received from Purinton \$4, on pretence that the deceased wished him to take the same to his wife, in San Antonio. Now, if the State proposed by this evidence to establish a motive on the part of defendant to kill deceased, she should have gone further, and have shown by the wife of deceased that defendant never paid her the money.

Because the evidence is not sufficient to sustain the verdict and judgment, and because, therefore, the court erred in overruling defendant's motion for a new trial, the judgment below is reversed and the cause remanded.

Reversed and remanded.

J. W. BLASDELL v. THE STATE.

INFORMATION—ILLEGAL PRACTICE OF MEDICINE.—If there be exceptions contained in the same clause of an act which creates the offence, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exceptions. But if an exception or proviso be in a subsequent clause or statute, or, although in the same section, if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defence, and need not be negatived

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in the pleading. The *provisos* of "An act to regulate the practice of medicine" (Gen. Laws 1876, p. 281), are not properly exceptions, and need not be negatived in an information.

APPEAL from the County Court of San Jacinto. Tried below before the Hon. G. W. McKELLAR, County Judge.

The conviction was for violation of the act "regulating the practice of medicine in this State." Gen. Laws 1876.

Denson & Turnley, for the appellant. The court should have sustained the demurrer to the information and dismissed the case, for the information was clearly insufficient to warrant a prosecution.

It will be perceived that the law makes the following exceptions to its operation, viz. :

1. "*Provided*, that nothing in this act shall be so construed as to apply to those who have been regularly engaged in the general practice of medicine under the act of May 16, 1873.

2. "*Provided*, that nothing contained in this act shall be so construed as to apply to those who have regularly engaged in the general practice of medicine in this State, in any of its branches or departments, for a period of five consecutive years prior to the 1st day of January, 1875; nor to those who have obtained certificates of qualification under said law; nor to females who follow the practice of midwifery, strictly as such." Acts Fifteenth Legislature, 232, sec. 5.

The rules governing informations prescribe the same requisites in charging the offence as in indictments.

In *Duke v. The State*, 42 Texas, 459, the Supreme Court say: "The rule regulating indictments for violation of statutes, which is believed to be of universal acceptance, may be stated to be: when an offence is created by statute, and there is an exception in the enacting clause, the indict-

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ment must negative the exception. 1 Bishop's Cr. Proc., sec. 382, note 3, sec. 376; 1 Whart. Cr. Law, sec. 379; *Hewitt v. The State*, 25 Texas, 722. The reason of this rule is that such exceptions constitute a part of the description of the offence, and unless they are negatived no offence is stated. The indictment must state such facts as constitute a crime." Bishop's Stat. Cr., secs. 369-371.

The case above referred to was a prosecution under the law which "regulates the keeping and bearing of deadly weapons." The exceptions are as follows: "*Provided*, that this section shall not be so construed as to prohibit any person from keeping or bearing arms on his or her own premises, or at his or her own place of business; nor to prohibit sheriffs, or other revenue officers, and other civil officers, from keeping or bearing arms while engaged in the discharge of their official duties; nor to prohibit persons travelling in the State from keeping or bearing arms with their baggage." Pasc. Dig., art. 6512. This act is exactly similar to the one under consideration, and the exceptions not having been stated in the indictment, it was held to be defective.

Whether the defendant had complied with the act of May 16, 1873, or had been practising medicine more than five years consecutively in this State prior to January 1, 1875, made no difference under the information in this cause. If he pleaded either exception, it would have been outside of the issues presented by the information, and could not avail him. This comprehensive information would reach the midwife, whom the Legislature thought fit to exempt as a "sacred visitor at a crisis in the affairs of men."

George McCormick, Assistant Attorney-General, for the State.

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WINKLER, J. The appellant was prosecuted by information, in the County Court, for an alleged violation of the act of the Fifteenth Legislature (Gen. Laws 1876, p. 231) entitled "*An act to regulate the practice of medicine.*"

The first and most material ground relied on for a reversal of the judgment is that the information, as stated in the defendant's exceptions, "does not contain the allegations necessary and material to constitute the offence charged in the statute." The substance of this exception, as gathered from the argument of counsel for the appellant, is that the information does not charge, by proper negative averments, that the accused does not come within the two *provisos* appended to the fifth section of the act. It is urged, in behalf of the appellant, that these *provisos* enter into the statutory definition of the offence, and that, therefore, they should have been properly negatived in the information, and that an omission to so charge vitiates it; and bases his argument mainly on *The State v. Duke*, 42 Texas, 455, and authorities there cited. After a careful examination of the case, in the light of the authorities cited in support of the opinion, we find nothing contained in it from which we dissent. On the contrary, we are of opinion that it is not only an able and lucid, but an accurate enunciation of the law of that case, and a correct construction of the statute to which it applies. In so far as that case lays down the general rules applicable to declaring upon statutes generally, the rulings made in that case apply to the present, so far as that branch of the subject is concerned, inclusive of the general rule there stated, and which was believed to be of *universal application*, viz.: "When an offence is created by statute, and there is an exception in the enacting clause, the indictment must negative the exception." Further than this, that case supports the position of the appellant, or not, as the statute

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there construed is similar or dissimilar to the statute we are considering.

The rules of construction there adopted apply here, by analogy, to the extent that the two statutes are similar; but if the two statutes are so entirely dissimilar, then that case would have no analogy to the present case, and the rule of construction would not apply.

The act construed in Duke's case was that well known as the six-shooter law. The portion of the act which was held to be the enacting clause, and on which it was held that the exceptions therein contained should be negatived in the indictment, is copied in the opinion. By reference thereto, it will be seen that the exceptions therein in favor of certain persons mentioned are so entirely connected in the *enacting clause* as that the pleader could not well set out the offence in the language of the statute without noticing the exceptions. It is worthy of remark, too, the precise grounds upon which it was held that the exceptions come within the enacting clause. The court say: "Regarding the form and the place which these regulations occupy in this very loosely drawn statute as not affecting their real nature, or the essential parts of the description of the offence, we hold that it was necessary that the indictment should substantially negative that the pistol was carried by a person, or at a place, or under circumstances allowed by the statute."

It is apparent that the ruling was based upon the intimate connection between the statement of the offence and the exceptions thereto. Another distinction should be borne in mind: that is, that in Duke's case the constitutionality of the act was materially involved, whilst in the present case no such question is raised. And still another: that was a statute to regulate the manner of doing a thing which, ordinarily, all men had a right to do, whilst here the

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general scope of the statute was to bring all men under its provisions.

With reference to the statute we are considering, the first section provides "that no person shall be permitted to practice medicine, in any of its branches or departments, in this State, without first having a certificate of qualification from some authorized board of medical examiners, as herein provided."

The second section prescribes the mode of proceeding required of the practitioner, and like subjects. The third section makes provision for the appointment of a board of medical examiners, the subjects upon which applicants shall be examined, and for granting and recording certificates of qualification. Section 4 relates to the boards, and how they shall proceed in the discharge of their duties, and the like; and the fifth section provides, first, the consequences for violating any of the provisions of the act, and the amount of penalty attaching; second, it directs how the fine shall be disposed of; third, it makes it the duty of district judges to give the act in charge to grand juries, which is followed by the two provisions in question, and which, it is contended, should have been negatived, to wit: "*Provided*, that nothing in this act shall be so construed as to exclude or disqualify any person who may have been already qualified for the practice of medicine under the act of May 16th, 1873; *provided*, that nothing in this act shall be so construed as to apply to those who have been regularly engaged in the general practice of medicine in this State, in any of its branches or departments, for a period of five consecutive years in this State, prior to the first day of January, 1875, nor to those who have obtained certificates of qualification under said act, nor to females who follow the practice of midwifery, strictly as such."

We are of opinion that there can be no room for contro-

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versy that, on the vital point under consideration, between this and the six-shooter law, the two are entirely dissimilar. There, the exceptions run along with the enacting clause, as understood by the Supreme Court; here, the features of the statute involved are not *exceptions proper*, nor so connected as to be inseparable from the provisions. So that the case cited and relied on for a reversal seems to us to tend the other way; and by it, on the reasoning given, these *provisos* cannot be held to be embraced within the enacting clause, as that phrase is employed in the books, so as to render it necessary on that account to negative by averment the subjects thereof.

A standard authority lays down this rule: "When the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it. Matt. Dig. 200, 275; 2 Leach, 664; 2 East P. C. 928. And if there are any exceptions contained in the same clause of an act which creates the offence, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. Id. 275; 1 Texas, 141; 15 East, 456; 1 id. 643; — Leach, 580; Russ. & R. 174, 321. But if an exception or proviso be in a subsequent clause or statute (1 Texas, 320), or, although in the same section, yet if it be not incorporated with the enacting clause by any words or reference (1 Barn. & Ald. 94), it is, in that case, matter of defence for the other party, and need not be negatived in the pleading. Matt. Dig. 276; Arch. Cr. Pl. 48; 3 Ch. Burn's J. 456; Arch. Cr. Pr. & Pl., Waterman's notes, 6th ed., 86-2, note 2.

It is said by another: "The reason of the rule under consideration is, to use the language of Metcalf, J., simply

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this: 'Unless the exception in the enacting clause of a statute, or in the general clause of a contract, is negatived in pleading the clause, no offence or no cause of action appears in the indictment or declaration, when compared with the statute or contract. Plow. 410. But when the exception or provision is in a subsequent substantive clause, the case provided for in the enactment or general clause may be fully stated without negating the subsequent exception or proviso. A *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or the contract to bring it forward in his defence.' " 1 Bishop's Cr. Proc., sec. 639, note 2, citing *The Commonwealth v. Hurt*, 11 Cush. 130.

From these authorities we conclude that the two *provisos* appended to the fifth section of the act under consideration are not necessarily to be considered as being within the enacting clause; that any act which would violate the provisions of the act could be set out substantially in the language of the act, without noticing the matter contained in the *provisos*; and, therefore, in declaring upon the statute, either by indictment or information, it would not be obligatory upon the pleader to negative by averment any person or matter embraced in these *provisos*, or either of them; and that the matters embraced in the *provisos* are properly matters of defence. It is hardly to be supposed that a prosecuting attorney would go to the trouble to charge one coming clearly within either of the *provisos*; but if this should be done, no injury could result, as the party charged would most likely know his particular privilege under the law, and how to plead it to better advantage than the State could prove a negative. The proof required would be admissible under the plea of "not guilty."

We do not deem it necessary to consider specially any of the other errors complained of.

Both the information and the charge of the court are ob-

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noxious to criticism. Still, the former is believed to be sufficient to put the accused upon his defence, and to support a conviction for a misdemeanor; and the latter, though somewhat confused, could hardly have misled the jury in their finding. There was a sufficiency of competent testimony properly admitted to support the verdict and judgment, and we find nothing to warrant a reversal.

The judgment of the County Court is affirmed.

Affirmed.

A. H. WATSON v. THE STATE.

1. **FORMER CONVICTION.**—The accused, in a prosecution for an aggravated assault, pleaded former conviction, and introduced a justice's judgment of conviction for simple assault on the same person and at the same time as the alleged offence on trial. It is shown that the justice acted without affidavit or warrant of arrest, examined no witnesses, and his judgment shows that his action was on the submission and demand of the accused. *Held*, that the justice's action placed the accused in no jeopardy, and constitutes no bar to this prosecution for aggravated assault.
2. **EVIDENCE.**—It is the province of the jury to pass upon the credibility of the testimony; and when there is found sufficient evidence to sustain the verdict, it will not be disturbed on appeal.

APPEAL from the County Court of Hamilton. Tried below before the Hon. D. C. SMITH, County Judge.

The opinion states the case.

Eidson & Pierson, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant was tried, on an information presented against him in the County Court of Hamilton County, for an aggravated assault and battery, committed

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upon C. M. Boynton on February 2, 1878. The defendant pleaded a former conviction for the same offence, and also not guilty.

In support of his plea of former conviction, the defendant read a certified copy of a judgment rendered by one Simpson Loyd, as a justice of the peace of Hamilton County, which is as follows :

“ The State of Texas }
 v. } No. 89.
“ A. H. Watson. }

“ Assault and battery in and upon the body of C. M. Boynton, in the town of Hamilton, on the 2d day of February, 1878.

“ Now on this February, 2d day, 1878, comes defendant, and pleads guilty to the above-entitled charge ; therefore, it is ordered, decreed, and adjudged by the court that the defendant is guilty as charged, and that the State of Texas do have and recover of and from the defendant the sum of five dollars, and all costs of this behalf expended ; ” — and signed by the justice of the peace.

It was shown on the trial in the County Court that no complaint was filed, and no warrant issued, and no evidence heard before the justice of the peace, except defendant's own statement.

There is no perceivable difference between the case at bar and that of *Warriner v. The State*, decided by this court, in which it was said that “ the justice of the peace, in the absence of an affidavit and warrant, and of an examination of the case, could not oust the District Court of its jurisdiction to try the accused for an offence of higher grade than that to which he had pleaded not guilty. Nor could the defendant, by waiving an examination into the circumstances under which the assault and battery was committed, screen himself by submitting to a nominal fine, and avoid the legitimate consequences of his acts, according to the de-

Syllabus.

gree of aggravation or mitigation shown by the evidence.”
 3 Texas Ct. App. 104, and cases cited.

The court submitted proper instructions to the jury on the issue raised by the special plea of defendant, and the jury found the matters alleged in the defendant's plea of former conviction not true.

We have carefully examined the different errors assigned by defendant, and have failed to discover any error committed in the County Court for which the judgment should be reversed.

There was considerable conflict in the evidence. The testimony, both for the State and the defence, showed that defendant committed an assault and battery upon the person of Boynton. The point upon which they differed was as to whether defendant inflicted serious bodily injury upon the person assaulted. The jury, who had the witnesses before them, saw their manner on the stand, and heard them testify, doubtless believed the witnesses for the prosecution; and the judge who presided in the court below refused to grant a new trial. There being sufficient evidence to sustain the judgment, it is, therefore, affirmed.

Affirmed.

5	273
28	392
5	273
31	636

P. B. MARSHALL v. THE STATE.

1. **MURDER BY POISON—INDICTMENT.**—See an indictment for murder by poison held sufficient.
2. **EVIDENCE**, though not bearing *directly* on the issue, nor sufficient *per se* to support a conviction, is admissible if it *tends* to prove the issue or constitute a link in the proof of it.
3. **SAME—PRACTICE.**—The relevancy of evidence to the issue need not be intrinsically apparent when it is offered. If the counsel undertakes to connect it with the issue by other evidence, the practice is to admit it, and afterwards, if not so connected, to withdraw it from the jury. But, especially in capital cases, prosecuting counsel should never so tender collateral evidence calculated to prejudice the accused, unless morally certain of his

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ability to make good his undertaking to show its relevancy. The law as much enjoins the protection of the innocent as the conviction of the guilty.

4. **CONFESSIONS.** — When a confession of the main fact in issue would not be admissible, evidence of a confession of collateral facts tending to establish the main fact should not be admitted.
5. **SAME — CASE STATED.** — In a trial for murder, the State was allowed, over the defendant's objection, to prove that the defendant, after his arrest and while in custody, sent word to a witness to leave the country, promising to furnish him money for the purpose. No warning was given the defendant that his statement might be used against him. *Held*, that the evidence was not competent under the provisions of the Code, and its admission was error.
6. **IMPEACHMENT OF WITNESSES.** — In impeaching the credit of a witness, it is proper to inquire as to his general reputation for truth in the neighborhood of his residence, and whether that reputation is such as entitles him to belief; but not to ask the impeaching witness whether, from such reputation, he would believe the impugned witness.
7. **SAME.** — The inquiry must be limited to the general reputation of the impugned witness in the community of his residence, or where he is best known: and the impeaching witness must speak from the general reputation, and not from his own individual opinion.
8. **BILL OF EXCEPTIONS — PRACTICE IN THIS COURT.** — When matters of fact are involved in the rulings of the court below, such rulings will not be revised by this court unless the facts are substantiated by proper bills of exception. Statements in a motion for a new trial or an assignment of errors do not suffice.

APPEAL from the District Court of Young. Tried below before the Hon. J. R. FLEMING.

The appellant was charged, by indictment, with the murder, by poison, of Dora Dees, on April 3, 1878, in Young County, Texas. A condensed statement of the leading evidence is here appended. The verdict was murder in the first degree, and the judgment death by hanging. The State's witness Shockley had been arrested as a *particeps criminis*, but turned State's evidence.

The charging part of the indictment is as follows:

“That, heretofore, on, to wit, the 3d day of April, A. D. 1878, in the county of Young, and State of Texas, P. B.

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Marshall, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, contriving and intending one Dora Dees to deprive of her life, and her feloniously to kill and murder, on the said 3d day of April, A. D. 1878, and on divers other days before and after the said 3d day of April, and before the finding of this bill, with force and arms did knowingly, unlawfully, wilfully, feloniously, and of his malice aforethought, mix and mingle certain deadly poison, to wit, strychnine, in certain flour which had been at divers days and times, during the time aforesaid, prepared for the use of the said Dora Dees ; and was afterward, to wit, on the said 3d day of April, made into bread for the use of the said Dora Dees, to be eat by her, the said Dora Dees, he, the said P. B. Marshall, then and there well knowing that the said flour, afterwards made into the said bread, with which he, the said P. B. Marshall, did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said Dora Dees, with intent to be then and there administered to her for her eating the same ; and the said bread, so made from the said flour, with which the said poison was so mixed, as aforesaid, afterward, to wit, on the said 3d day of April, 1878, and on the said other days and times, in the said county of Young, was delivered to the said Dora Dees, to be then and there eat by her ; and the said Dora Dees, not knowing the said poison to have been mixed with her said bread, made of the said flour, did afterwards, to wit, on the said 3d day of April, and on the said divers other days and times, then and there eat and swallow down into her body several quantities of the said poison so mixed, as aforesaid, with the said flour ; and the said Dora Dees, of the poison aforesaid, and by the operation thereof, became sick and greatly distempered in her body ; of which said sickness and distemper of body, occasioned by the said eating, taking, and swallow-

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ing down into the body of the said Dora Dees of the poison aforesaid, so mixed and mingled in the said flour, as aforesaid, she, the said Dora Dees, from the said several days and times on which she had so taken, eaten, and swallowed down the same, as aforesaid, did languish, and, languishing, did live until the 4th day of April, 1878; on which said 4th day of April, 1878, in the said county of Young, she, the said Dora Dees, of the poison aforesaid, so taken, eaten, and swallowed down as aforesaid, and of the sickness and distemper thereby occasioned, did die; and so the grand jurors aforesaid, upon their oaths aforesaid, do say and present that the said P. B. Marshall, in the State and county aforesaid, and on the day and year aforesaid, and by the manner and means aforesaid, unlawfully, knowingly, and feloniously, and of his malice aforethought, her, the said Dora Dees, did kill and murder, contrary to the law, and against the peace and dignity of the State."

A. N. Dees testified, for the State, that he was the father of deceased, and had been for some time on bad terms with the defendant. On the evening of April 2, 1878, witness, with his wife, attended a party at a neighbor's, some two miles from their home, leaving their little daughter, the deceased, some seventeen months old, in charge of one Howard, who lived with them. They returned early next morning, and found their dog, which they left tied near the door, dead, where he was tied. Witness, his wife, and the deceased ate breakfast, after which witness dragged his dog off, and cut him open, finding in his stomach two pieces of bacon, between which was found a piece of strychnine. Witness laid the meat on the plate of the house, and went down into the field, where he found defendant and one Shockley at work. Here he accused defendant of poisoning his dog, which the defendant denied, expressing the suspicion that one Moore had done the poisoning, alleging that Moore had threatened witness in his (defendant's) hearing,

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some days before. Witness, on his return, found his child sick and in convulsions. Sent for Mrs. Marshall and the doctor, the latter arriving at nine o'clock. The child died on the same day, April 3, 1878, between twelve and one o'clock, A. M. The child was in good health the evening before, and ate a hearty breakfast of biscuit and gravy. The biscuits were made of flour from a sack that had been some days in use, and were made that morning. Saw the child buried, some twenty-four hours after death, and was present when it was exhumed and a *post-mortem* examination had.

As soon as witness became convinced his child was poisoned, he gathered up the biscuits left, and put them in a boiler behind the stove, and, after the child's death, had them analyzed by a chemist, the analysis disclosing the presence of strychnine. Defendant and witness cultivate land in the same enclosure, the witness's land being farther removed from his house than that of defendant, which lay between his (witness's) house and land. The approach to the witness's house from where he worked—and was at work on the evening of the 2d, until he returned to go to the party—was obscured from sight by intervening obstructions. There was no one at the house of witness on the evening or day of the 2d, the child having been left with its aunt, Miss Jones, at Mrs. Marshall's.

The witness and his wife, having no appetite, ate but a meagre breakfast on the 3d, yet witness felt much troubled with pains in his bowels and bones; had experienced no such sensations before. The sack of flour from which the biscuit were made for breakfast was used no more, but another opened before another cooking. Witness investigated the charge that Moore had done the poisoning of the dog, but found that Moore had gone to Weatherford two weeks before, and had not been back in the neighborhood, and had not seen defendant. Discovered that Dr. Stroop,

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in Graham, had sold some strychnine near the time the child died. Witness further testified that he and Moore were friends. He and defendant were not friends. On cross-examination, he says that defendant and Shockley worked some 600 yards nearer witness's house than witness and his wife did, and that witness's house could not be seen from where he (witness) and his wife worked. Had not said to Mrs. Marshall that he was fearful the child had got hold of some of the poisoned meat; knows that it did not, for he first put the meat on the house-plate, and then burned it. The child ate no meat that morning. His house had a main and shed room, the door to the latter having no shutter, — only a wagon-sheet.

Elbert Jones, for the State, testified that he is the father of Mrs. Dees, the mother of deceased, and was staying at Dees's house at and about the time of the alleged poisoning. On the morning of April 3, 1878, going from Humphries's house to Marshall's, with his two daughters, he heard of the sickness of Dees's child. He immediately went to Dees's and found the child in spasms. After being there some time, he took his position near by to watch the child, having first poured out some coffee from a pot standing on a table in the shed-room. While drinking this, he inadvertently took up a fragment of a biscuit lying near, and commenced eating it. He found it so strangely and unusually bitter that the presence of strychnine was impressed upon his mind. He immediately spit it out, apprehensive, though not sure, that it contained strychnine; and went presently into the woods on private purposes, and there discovered the disembowelled body of Dees's dog. Did not know of the death of the dog before he found the body in the woods. Convinced that both the dog and child had been poisoned, he returned to the house to announce his belief, but found the child sinking so fast he said nothing of it until after the

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child's death. He then told the doctor of his apprehensions, and the doctor immediately said that the child had unquestionably died from poisoning by strychnine.

Witness and Dees examined the meat taken from the dog's stomach, which they found on the house-plate, and discovered in it a piece of crystal strychnine. The meat was immediately burned. Witness went with Dees into the smoke-house, and saw the sack of flour, of 100-pound size, half used, from which the biscuit were said to have been made, and assisted Dees in bringing into the house one of six unused sacks of flour, from which subsequent meals were cooked. Upon consultation with Dees, witness went to Graham, and discovered that Dr. Stroop, on or about April 1st, had sold some strychnine to a man unknown. Saw Dees and his wife gather up the biscuit left over from breakfast, and deposit them in a boiler behind the stove, and know they were the same of which a number were analyzed by Dr. Stroop.

On cross-examination: Knows the taste of strychnine, having taken and administered it under direction of physicians. Dinner, on April 3d, at Dees's, was at a later hour than usual; was cooked by one of his daughters and Miss Mollie Marshall. Saw the defendant at work that day, and saw him go to his (defendant's) house during the day, but does not know what for. Saw Dees and his wife at work that evening. Dees and his wife worked from 700 to 1,000 yards from their house, and defendant was at work between them and said house, and from 300 to 500 yards nearer the house than they worked.

Dr. L. J. Stroop, for the State, swears that he is a druggist in Graham, Young County; that he sold Shockley ten grains of crystal strychnine, for 10 cents, directing him, as it was a small parcel, to place it in his pocket-book, which he (Shockley) did, in witness's presence; that a few days afterwards Mr. Dees and the district attorney of Young

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County brought him some biscuit, which, after applying the sulphuric acid test, he found to contain crystal strychnine. Witness described the process through which he carried the analysis, and rested on the authority of medical books. Knows the man was Shockley, for the party purchasing so told him.

Samuel Howard, for the State, swears to the same material facts that Dees swears to. Says he was at work with Mr. and Mrs. Dees on the evening of April 2d. That they worked about 700 or 1,000 yards from the house, and 300 to 500 yards beyond where defendant and Shockley were at work. Could not see Dees's house from where they worked, nor any person about it. Took charge of deceased during the night of the 2d, when Dees and wife were absent. Witness ate cold victuals for supper; and next morning dressed the child, shortly before its parents came home. It was then in good health. Found the dog dead when he got up on April 3d, though it was alive and barking when he went to bed. Was not further from the house than ten steps during the absence of Mr. and Mrs. Dees. Mrs. Dees cooked breakfast next morning, and witness ate three biscuits, which tasted strangely bitter. Felt pains in his stomach through the day, and made several efforts to vomit. Knows of no hard feelings between defendant and Dees, except what he learned from the latter. Had, with Dees, taken seed-corn from defendant's crib during defendant's absence.

J. T. Bowen testified, for the State, that he lived with defendant, and knew W. P. Shockley, who also lived there. That, about April 1st, Shockley was sent by defendant to Graham for some things, but what they were defendant does not know. Shockley returned next day; and, while witness was unharnessing horses near the door of defendant's house, he saw Shockley pull out his pocket-book, and say to defendant, "Here, take this; I have had it long

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enough," — the two stepping to the corner of the house. Witness saw Shockley give something to defendant, and saw defendant take it, but does not know what it was; recognizes the pocket-book exhibited as very like the one he saw Shockley take from his pocket, and from it hand something to defendant.

On cross-examination: Knows that defendant had a sore hand at that time, but not so sore as to stop his work; never heard defendant make threats against Dees; knows that their families visit.

Miss Sophronia Jones testifies that, on the day before Dora Dees died, she got in the wagon with Shockley, on his return from Graham, and rode with him from Brown's to the river, where he stalled; and from there she walked with him up to the house of defendant, and when they got there saw Shockley give defendant something, but does not know what it was.

The witness Bengé knew that the body exhumed for a *post-mortem* examination was that of Dora Dees, whom he knew and buried.

Dr. Davidson testified that the deceased, judging by the symptoms, died from the effects of strychnine. If witness ever told Mrs. Marshall that it had worms, it was told to quiet those around while he made an examination; said then, and says now, it died from the effects of strychnine.

Drs. Dyus and Stover, for the State, testify that, in the *post-mortem*, they found strychnine in the stomach of the child in quantities sufficient to kill, describing their test, etc.

W. B. Lawrence swears that defendant, on the day of his examining trial, came to his house, under guard, and asked him to see Shockley and ask him to leave the country, for which he (defendant) would furnish him the money.

W. P. Shockley, testifying for the State, says that he lived with defendant in April, 1878. On the first day of

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that month, by direction of defendant, he went to Graham to make purchases and transact business for defendant, taking Miss Jones with him as far as Capt. Brown's, near to which point defendant accompanied them on horseback. After passing Brown's, where he left Miss Jones, he was overtaken by defendant, who directed him to purchase, among other things, 25 cents' worth of strychnine. Witness, after purchasing other things ordered, had but 10 cents left, with which he purchased strychnine from Dr. Stroop, putting it in his pocket-book, as directed by the druggist. On his return, next day, he took Miss Jones up at Brown's, and drove with her to the river, where his horses stalled. After going up to the house and delivering the other purchases to Mrs. Marshall, he took out his pocket-book and gave the strychnine to defendant, saying, "I have had this long enough." They then went to the field to work. The witness described the locality of the defendant's and Dees's fields as described by other witnesses, and saw Mr. and Mrs. Dees and Howard at work, some 500 yards off. Twice during the evening witness and defendant went up to defendant's house. On the last trip to the house, defendant cut from a side of bacon, or hog-meat, a piece about three inches long and two inches wide, saying to his wife that he intended using it to grease a plow. After reaching the field, he sliced this meat twice, from one end to within an inch of the other. In these splits he put some of the strychnine, after which he wrapped the rest up and put it in the lining of his hat. Defendant said, "Now, I'm going to kill that d—d dog that has been tearing my pigs." He went off down the "swag," and I watched him until he went around Dees's house. From his (defendant's) house, or from where Dees, his wife, and Howard were at work, this approach could not be seen; but from where witness was, the defendant could be seen all the way. Witness next saw defendant standing

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in the shed-room door of Dees's house. When he (defendant) came back, he asked witness if there was enough of the strychnine given to kill the dog. Witness answered that it was, if given; and defendant said he had given it, and had offered the dog water from a pan, but the dog would not drink. The witness then asked what defendant had done with the balance of the poison, and he said he had placed it in a crack of the house. Witness suggested that this disposition of it was dangerous, as some one might get hold of it. Defendant said he had put it where he couldn't find it himself. After the death of the child, witness and defendant again spoke of the poison, when defendant said things were getting so hot he had burned it.

Witness afterwards told defendant that Dees was asking all over the country for Moore, when defendant said Dees was a d—d fool to be hunting Moore for the man who committed the crime. Witness then told defendant that Moore had threatened to kill Dees; and defendant said that if Moore wanted any help, he (defendant) would let him have a shot-gun that would throw shot a hundred yards. Defendant said that Dees was trying to undermine him (defendant); that he (Dees) had been to Palo Pinto to see Sam Haynes, in an effort to purchase his (defendant's) land. After witness was arrested, he was carried to the sheriff's office, where defendant and his attorney, Glasgow, were, both of whom told witness that he (witness) could swear anything he pleased so he said nothing about giving defendant the strychnine. This was before witness testified at the examining trial.

On cross-examination, witness said that he saw defendant at the east door of Dees's shed-room, and supposes, as he left there, he went through the main room and out at the south door. Witness does not know his relation to Miss Mollie Marshall, defendant's daughter, at this time, but was engaged to be married to her when this poisoning happened.

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Defendant never told witness that "this thing had to be stopped," and never opposed his engagement to his daughter Mollie. Was present in the field when Dees accused defendant of poisoning his dog, and defendant denied it. Witness told Dees he had seen Moore in Waco Bend a few days before, in order to keep down a fuss, defendant having told Dees he (defendant) suspected Moore of poisoning the dog. Witness had not seen or heard of Moore for three weeks.

Mrs. Lou R. Marshall, for the defence, testifies that she is the wife of defendant, and remembers the day the child died. Being sent for, she went up to Dees's and found it very sick. The doctor came shortly afterwards, and pronounced its ailment to be worms, and so treated it. Witness does not remember seeing any one eat at Dees's, but ate a biscuit herself that was cooked that morning, from the effects of which she felt badly. Witness asked Dees what he supposed was the matter with the child. He said he feared that it was poisoned; that his dog had been poisoned the night before, and he was afraid the child had got hold of some of the poisoned meat he had taken from the stomach of the dog and placed on a stump or box. Witness, her husband, and the Dees family were friendly, and Mrs. Dees's sisters had been staying at her house. Mr. Dees told witness that his dog must have been poisoned about eleven o'clock the night before, as he was still warm when cut open. Defendant and witness sleep together, and witness knows the defendant was not out of bed during the whole of the night in question. There was no particular intimacy between defendant and Shockley.

Miss Marshall, sworn, says that she is the daughter of defendant. Was at Mr. Dees's the day his child died, and assisted in the cooking. Mr. Shockley had addressed witness, and they were engaged. Witness's father, the defendant, had said nothing to her about the engagement, but did not approve of it.

Argument for the State.

Cross-examined, she says that defendant knew nothing of the engagement. Witness and her mother ate one of the biscuits cooked in the morning, getting them out of the boiler behind the stove.

J. T. Walters, for the defence, testifies that defendant told him he was going to raise hell about his daughter's engagement with Shockley.

Capt. Brown, E. Robinson, E. G. Massey, and J. T. Walters all swear they knew the general reputation of Shockley for truth and veracity in his neighborhood, which reputation was bad. All of these witnesses but Brown had known Shockley only since the previous November. Brown had known him in three counties, with the same reputation; and further, that Shockley came to this country in his (Brown's) employ. Brown said he "was friendly with Shockley, and has employed counsel to prosecute him in this case."

In rebuttal, the State proved by Capt. Moseley, Mr. Benge, his son, and Mr. Humphries, that Shockley has been in the country only since November, not long enough, in the estimation of witnesses, to make a reputation. Some of these witnesses, a short time before, had seen Shockley at a party at Capt. Brown's, as the escort of Miss Marshall, and taking a leading part in the party.

No brief for the appellant.

George McCormick, Assistant Attorney-General, for the State. As to the second error assigned, the court will see, from an inspection of the facts set out in the bill of exceptions, that the court did not err.

The prisoner had sworn to an application for a continuance, stating that he desired the testimony of a witness; that such testimony was material to his defence; that due diligence had been used to secure the witness's attendance, and that he was not absent by affiant's consent or procure-

Argument for the State.

ment, etc. Notwithstanding this oath, a letter had been written by the prisoner's leading counsel requesting the witness to evade the process of the law, that thereby the prisoner's cause might be continued.

The district attorney, having a knowledge of the fact that the witness had been purposely kept away from the court, attempted to show that it was done with the knowledge and consent of the prisoner; and with the understanding on the part of the court that the prisoner would be connected with the act of his attorney, the court permitted evidence of the acts of the attorney to go to the jury; but when the State's counsel failed to connect the prisoner with the facts, the jury were directed to disregard the evidence, and it was withdrawn from their consideration.

It was within the province of the court to withdraw the testimony from the jury. *Sutton v. The State*, 2 Texas Ct. App. 342. And having been withdrawn from the consideration of the jury, no matter for what reasons, it cannot now be urged here that such evidence was erroneously admitted.

The court did not err in excluding evidence tending to show a feud and ill-feeling between the father of the murdered child and one Moore. Such evidence was immaterial, and not in accordance with the rule requiring the evidence to be confined to the point at issue, or tending in any way to elucidate the matter before the court.

In the case at bar the serious question arises, viz. : If the poison was placed in the sack of flour with the intent to kill any other person than the deceased, would the fact that deceased was killed thereby, of itself, without further proof of express malice, render the defendant guilty of murder in the first degree?

The statute (Pasc. Dig., arts. 2198-2200) provides that if any person shall mingle poison with any drink, food, or medicine, with intent to kill or injure any other person, and by reason thereof the death of a person be caused, the

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offender shall be deemed guilty of murder. Now, as to whether this offence would be murder in the first or second degree is settled by the statute, which declares that all murder committed by poison shall be murder in the first degree. Pasc. Dig., art. 2267.

The Supreme Court, in *McCoy v. The State*, 25 Texas 33, and in the case of *Ferrell v. The State*, 43 Texas 503, seems to have held that the malice required to raise a killing from murder in the second degree to murder in the first must be directed against the party killed. But this doctrine, whether correct or false, cannot apply to a killing by poison. The statute declares that to administer poison with intent to injure, and which results in death, is murder in the first degree ; or, at least, a proper construction of the provisions of the Code leads to this conclusion.

If, then, this be the law of this State, the court did not err in failing to charge the jury the law applicable to the offence of murder in the second degree. But, again, it would seem that the facts in the case at bar did not authorize a charge on murder in the second degree. If the poison was laid in the flour, the food of the family, the design must have been to kill the whole family ; the prisoner, at the time he placed the poison there, must, from the very nature of the act, have been actuated by malice towards all whom he expected to take his deadly poison ; and the fact that only one of the family (the child) was killed does not reduce the offence to a lower grade than it would have been had he killed the whole family. The prisoner, by placing the poison in the food of the family, although it might not affirmatively appear that he intended especially to kill the child, or that he had such malice against the child, was guilty of and evinced such specific malevolence, such utter disregard of human life, such express malice against all of the family, whom he supposed would take the poison, as to show murder in the first degree.

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The only other question that it is deemed necessary to refer to arises upon the bill of exceptions taken to the admission of the statement of the prisoner, made while under arrest.

I submit that the statements made by the prisoner to the witness Lawrence cannot be considered *confessions*, as that term is used in our statute forbidding the introduction of such testimony. It is true that this court, in *Haynie v. The State*, 2 Texas Ct. App. 174, held, in substance, that there is no difference in the rule admitting such testimony when the confession is direct and positive and when it is only collateral, and tends to establish a matter connected with the *corpus delicti*.

In the case at bar, the prisoner told his friend to go and tell his co-defendant to leave the country, and that he would furnish him with the money to leave on. This simply shows that for some reason the prisoner was anxious that his co-defendant, who afterwards turned State's evidence, should absent himself, avoid arrest, and keep out of the way of the officers of the law. It is true that unfavorable inferences may be drawn from such a message having been sent, but certainly it cannot truthfully be said that such a message was an admission or confession of guilt. For a full discussion of this question see *Speer v. The State*, 4 Texas Ct. App. 474, and authorities cited.

WHITE, J. P. B. Marshall, this appellant, was indicted for the murder of one Dora Dees. The murder is alleged to have been committed by mixing and mingling strychnine, a deadly poison, with flour, which was afterwards made into bread, and which was thus eaten by the said Dora Dees, from the effects of which she died on April 4, 1878.

The statute under which the indictment was brought reads as follows:

“ If any person shall mingle any poison, or any other

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noxious potion or substance, with any drink, food, or medicine, with intent to kill or injure any other person, or shall wilfully poison any spring, well, cistern, or reservoir of water with such intent, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years." Pasc. Dig., art. 2198.

"If any person shall, with intent to injure, cause another person to inhale or swallow any substance injurious to health or any of the functions of the body, or if such substance was administered with intent to kill, he shall be punished by confinement in the penitentiary not less than two nor more than five years." Pasc. Dig., art. 2199.

"If, by reason of the commission of the offences named in the two preceding articles, the death of a person be caused within one year, the offender shall be guilty of murder, and punished accordingly." Pasc. Dig., art. 2200.

"All murder committed by poison * * * is murder in the first degree." Pasc. Dig., art. 2267; *Tooney v. The State*, decided at the present term of this court, *ante*, p. 163.

A motion was made to quash the indictment, which was, as we think, properly overruled; the allegations being, in our opinion, sufficient to charge the offence. Defendant's motion for a continuance being then heard and overruled, was immediately followed by a trial of the case, which resulted in the conviction of defendant, the punishment incident thereto and assessed being death by hanging.

The record of the proceedings, as presented here, is quite voluminous, and contains many interesting questions, which we do not propose to discuss, because not essential to a disposition of the case, and not likely to arise on a subsequent trial. We have given the case all the consideration which the importance to the defendant of the issues involved claimed at our hands, and in doing so have, if possible, experienced a greater degree of responsibility than usual

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even in such cases, owing to the fact that the conviction, in so far as it does not rest upon the testimony of a *particeps criminis*, is based on evidence entirely circumstantial, and the further fact that appellant has not been represented on his appeal, by brief or otherwise.

Six bills of exceptions were saved by defendant during the trial, three of which only it is proposed to notice, to wit, the third, fifth, and sixth.

The third bill is, that the court “permitted the district attorney to introduce testimony showing that the defendant’s leading counsel, J. H. Glasgow, Esq., had written to Emmett Marshall, a witness in said cause, to leave his place of business and remain away, so as to avoid the service of the process of the court, and to stay away until the said cause was continued, the district attorney stating to the court that he would be able to connect the defendant with the said conduct of his counsel; and the court, being of the opinion that the district attorney had not sufficiently connected the defendant with the said conduct of his counsel, excluded all of said testimony from the jury, then and there instructing the jury to disregard the same,” etc.

As laid down by Mr. Greenleaf, the rule is that “it is not necessary, however, that the evidence should bear *directly* upon the issue. It is admissible if it *tends* to prove the issue, or constitutes a link in the chain of proof, although it might not justify a verdict in accordance with it. Nor is it necessary that its relevancy should appear at the time when it is offered, it being the usual course to receive at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case.” 1 Greenl. on Ev., sec. 51 *a*. This is the rule in civil cases, and ordinarily the rules are the same in civil and criminal cases

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In the case at bar, the learned judge did all that he had power to do at the time, by instructing the jury to disregard the evidence, when he became satisfied that the district attorney had failed to connect defendant with the illegal acts of his attorney. Still it must be apparent that such testimony having once gone to the jury, its impression would necessarily, to some extent, remain in their minds, though they were ordered to discard it; and in a case of circumstantial evidence it is next to impossible to say how far that impression exercised its influence in supplying any defect which might have arisen, or in solving any doubt in their minds on the general state of the evidence. A prosecuting officer in behalf of the State, in his zeal for a conviction, should never overlook the fact that the interests of society and the vindication of the law require at his hands as much the protection of the innocent as the conviction of the guilty. Evidence of this character, in cases involving life, should never be proposed by him unless he is morally certain that he can make good his promise of connecting the defendant with the matter; there should be no room for doubt where, as in this case, he could have ascertained in advance the existence or non-existence of defendant's connection with the proposed evidence.

Bill of exceptions No. 5 was an objection to the entire testimony of the State's witness W. B. Lawrence, which was as follows: "I know the defendant, P. B. Marshall; have known him about a year and a-half. I live in the town of Graham, Young County. After the defendant, P. B. Marshall, and Shockley were arrested for the murder of Dora Dees, and while the said Marshall was under arrest, the deputy-sheriff brought him down to my house. While there he said to me, 'I want you to go and see Shockley, and tell him he must leave the country, and that if he will leave, I will furnish all the money he wants.' I made no reply. The deputy-sheriff was close enough to have heard

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this conversation; can't say whether or not he did hear it. It was in a low tone of voice."

Objection to the evidence was that defendant was in the custody of the officer at the time such declaration was made. Whether coming strictly and technically within the legal definition of a confession or not, it is evident that in its effect and the use it was intended to subserve, in connection with the other circumstances, it must have been introduced by the State as an equivalent to an admission or confession of guilt which could only be obviated by getting the principal State's witness out of the country. In this view, was the evidence admissible?

The rule prescribed by the statute is that "the confession of a defendant may be used in evidence against him, if it appear that the same was freely made, without compulsion or persuasion, under the rules hereafter prescribed." Pasc. Dig., art. 3126.

"Art. 3127. The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, *nor while he is in custody of an officer*, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law, or be made voluntarily, after having been first cautioned that it may be used against him," etc.

Now, in order properly to arrive at the gist of the question, let us suppose that the defendant, instead of telling the witness Lawrence to get Shockley to leave the country, had told the witness outright and absolutely that he had poisoned the deceased, would such testimony by Lawrence have been admissible? Clearly not. Why? Because the defendant at the time it was made was in custody, and had not been warned. If, then, he could not have testified to a confession directly admitting the *corpus delicti*, how could a confession of a collateral matter going to establish a matter directly connected with the *corpus delicti*, and essential to its proof,

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be admissible in evidence against him? The distinction between the two is not perceived. "When the confession of a defendant to the main fact in issue would not be admissible, it is, as a general rule, inadmissible to permit evidence of collateral facts by which it was necessary to establish the main facts." *Haynie v. The State*, 2 Texas Ct. App. 168; *Davis v. The State*, 2 Texas Ct. App. 588; *Taylor v. The State*, 3 Texas Ct. App. 387.

Under these rules, the admission of the testimony of the witness Lawrence was, in view of the circumstances stated in the exception, an error which would alone, of itself, necessitate a reversal of the judgment. We propose, however, to notice one or two other errors complained of.

The sixth bill of exceptions raises the question of practice as to the nature and extent of the questions to be asked with regard to the impeachment of a witness for truth and veracity in the neighborhood in which he lived. After the witnesses had stated that they knew the witness's character for truth and veracity in the neighborhood in which he lived, and that it was bad, defendant's counsel proposed to ask each of the impeaching witnesses the further question, "From that reputation, would you believe him upon oath?" which question was, on motion of the district attorney, excluded, upon the ground that it was unnecessary. As put, the question was doubtless incorrect. The mode and manner of impeaching a witness for truth and veracity was maturely considered and elaborately discussed in the able opinion of Bell, J., in *Boon v. Weathered*, 23 Texas, 675, and all the leading authorities examined and reviewed. Summing up the result of his investigation of the subject, he says: "Where the impeaching witness is asked 'whether or not he could believe the other on oath,' he is more likely to give an answer suggested by his personal knowledge, or prompted by his personal feelings, or his individual opinion, than he is when asked whether or not he is acquainted with

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the general reputation of the impeached witness for truth, and whether it is good or bad. If the impeaching witness states that he is acquainted with the general reputation of the former witness for truth in the community where he lives, *he may then properly be asked whether that general reputation is such as to entitle the witness to credit on oath;* or any other form of words may be used which do not involve a violation of the cardinal principles that the inquiry must be restricted to the general reputation of the impeached witness for truth in the community where he lives, or where he is best known, and that the impeaching witness must speak from general reputation or report, and not from his own private opinion." He says: "I think these conclusions are sound upon principle, and are supported by the most numerous and best considered authorities." 23 Texas, 675.

The last subjects which we propose to notice are the errors complained of in the second ground of the motion for a new trial, and the ground set forth in the second subdivision of the assignment of errors. In the motion for a new trial the error is thus stated: "That the cause of said defendant has been fatally prejudiced by the want of proper skill and management of his case by his counsel employed to defend him. The senior counsel in said defence was, during the pending of the trial of this cause, suspended from practising law by this court for malpractice, and only suffered to act as attorney-at-law during the further proceeding of said trial; thereby the defendant was seriously prejudiced in the minds of the jury."

In the second assignment of errors we find the following statement, viz.: That "the court erred in allowing evidence of unprofessional conduct of the leading counsel in attempting to get a continuance, before the knowledge thereof was brought to the defendant, to come before the jury; and permitting the attorneys for the prosecution to comment on the testimony having been so admitted as a circumstance of

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guilt, notwithstanding the court charged the jury not to consider such evidence.”

We have copied these two grounds of complaint more with a view of illustrating the necessity of an observance of the rules of practice than as points involved in the case.

If these errors were committed as alleged, then we can readily imagine how serious a damage might have been occasioned the cause of the defendant by having his leading attorney, in the presence and hearing of the jury, suspended from practice of the law for malpractice in the case then on trial by the jury; and we can also imagine the damage and wrong which might have been done by permitting attorneys for the prosecution to comment on such facts and circumstances in their argument of the case to the jury. But are there such facts in this case, which can be considered by us? Certainly not; there are no corresponding bills of exceptions, and they may be the mere unsupported assertions of counsel, for aught that appears in the record. If such proceedings did occur, then defendant's counsel should have saved a bill of exceptions, stating the facts and circumstances in full, and have presented it to the district judge for allowance; and if he refused to sign and certify the same, then have it authenticated by bystanders, as the law provides. This is the only mode by which such irregularities can properly be saved and presented for action and revision in this court. As they are presented in this record, no matter how grave or serious they might appear, we can take no notice of them, because they do not come before us as noticeable facts properly raised, and connected with and growing out of the case as tried in the court below.

As stated above, the judgment will be reversed because of error committed in admitting proof of admissions or *quasi*-confessions made by defendant whilst in custody.

Reversed and remanded.

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SAM WOODWARD v. THE STATE.

1. **INDICTMENT.** — When the indictment *directly* charges the carrying of a pistol about the person, the idea of the accused being a traveller is sufficiently negatived, as such excepted class are lawfully allowed to carry arms only with their baggage.
2. **JURISDICTION OF COUNTY COURTS.** — The County Courts of this State have jurisdiction, equally with justices' courts, to hear and determine misdemeanor cases when the penalty imposed does not exceed a maximum fine of \$200.
3. **EVIDENCE.** — Evidence showing that the pistol was held in the hand of the accused is sufficient to sustain the allegation of having it about his person.

APPEAL from the County Court of Cass. Tried below before the Hon. E. CROFT, County Judge.

The opinion discloses the case.

J. H. Henderson, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. Appellant was indicted under article 6512, 2 Paschal's Digest, for unlawfully carrying a pistol.

One ground of the motion in arrest of judgment was, that the information did not negative one of the exceptions enumerated in the statute, to wit, that defendant was a person travelling in the State, and keeping and carrying arms with his baggage. Every other exception mentioned in the statute was negatived in express terms. He is charged *directly* with carrying the pistol about his person, and this substantially negatives the idea that he was a traveller, for that excepted class are only allowed to keep and carry arms with their baggage.

In addition to this, it is alleged that he carried the weapon unlawfully and contrary to the statute. We think the information is sufficient. See *Duke v. The State*, 42 Texas,

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455; *Smith v. The State*, 42 Texas, 460, and *Blasdell v. The State*, decided at the present term of this court, *ante*, p. 263.

The next point raised in the case which we will notice was as to the jurisdiction of the court, and it is contended that because the fine imposed as a penalty by the statute is in its maximum limited to \$100, therefore the County Court had no jurisdiction, and the case came within the exclusive jurisdiction of the justice's court. This question has been settled by this court in the case of *Pat Solon v. The State*, just decided, *post*, p. 301.

We see no error in the charge of the court as given to the jury, nor in the refusal of the special instruction asked by defendant. As given, the charge presented the law of the case.

Another point relied upon by the defendant, and made in his motion for a new trial, in his assignment of errors, and urgently insisted upon in the brief of his counsel here, is that the evidence does not sustain the allegation in the information. "The bill of information alleging that defendant did carry *about* his person a pistol, while the testimony shows that he had a pistol, if at all on his person, viz., *in his hand*." We cannot well see how he could have a pistol *in his hand* unless he had it *about his person*.

The evidence is amply sufficient to sustain the verdict and judgment; and, there being no error, the judgment is affirmed.

Affirmed.

TOM R. JENNINGS v. THE STATE.

1. CARRYING PISTOL — JURISDICTION OF COUNTY COURT. — By "An act to organize County Courts," etc., and section 8 of "An act to provide for election of justices of the peace," etc., the Legislature has conferred upon the County Courts concurrent jurisdiction with justices' courts to try persons charged with unlawfully carrying pistols.
2. SAME — FORFEITURE OF PISTOL — CONSTITUTIONAL LAW. — That part of the act which provides for the forfeiture of the pistol, in case of conviction, is unconstitutional.

APPEAL from the County Court of Nacogdoches. Tried below before the Hon. R. H. MORRIS, County Judge.

P. F. Edwards, for the appellant.

George McCormick, Assistant Attorney-General, and *S. S. Johnson*, for the State.

ECTOR, P. J. The defendant in this case was prosecuted and convicted under article 6512, Paschal's Digest, for unlawfully carrying a pistol about his person. This article provides that in case of conviction, the defendant, for the first offence, shall be fined not less than \$25 nor more than \$100, and shall forfeit to the county the weapon or weapons so found on or about his person.

The first question which we propose to consider is this: Did the County Court have jurisdiction to try this cause?

Courts established by written law cannot transcend the jurisdiction of the law of their creation. We will first refer to sections 16, 19, and 22 of article 5 of the Constitution. The provision of the Constitution under which the Legislature established the County Courts is found in section 16, article 5, which provides that "the County Court shall have original jurisdiction in all misdemeanors of which exclusive original jurisdiction is not given to the justice's court, as the same are now or may be hereafter prescribed by law,

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and when the fine to be imposed shall exceed two hundred dollars," etc.

"Sec. 19. Justices of the peace shall have jurisdiction, in criminal matters, of all cases when the penalty or fine to be imposed by law may not be more than for two hundred dollars," etc.

"Sec. 22. The Legislature shall have power, by local or general law, to increase, diminish, or change the civil and criminal jurisdiction of County Courts; and in cases of any such change of jurisdiction, the Legislature shall also conform the jurisdiction of the other courts to such change."

Section 3 of "An act to amend an act entitled 'An act to organize the County Courts, and define their powers and jurisdiction,'" approved June 16, 1876, is as follows:

"The County Court shall have exclusive original jurisdiction of all misdemeanors, except misdemeanors involving official misconduct, and except such misdemeanors as are punishable by fine only, and in the punishment of which the highest fine to be imposed may not exceed two hundred dollars; that in cases where the offence charged is within the jurisdiction of the County Court, the court shall hear and determine the case, notwithstanding the proof may show an offence not within the jurisdiction herein conferred; *provided*, however, that nothing contained in this section shall be so construed as to prohibit the District Court from hearing and finally determining all charges of felony, whether the proofs develop a felony or misdemeanor." Gen. Laws 1876, p. 172.

The third section of "An act to provide for the election of justices of the peace, and to define their powers and jurisdiction," provides as follows:

"Sec. 3. Justices of the peace shall have and exercise original concurrent jurisdiction with other courts in all cases arising under the criminal laws of this State, except misdemeanors involving official misconduct, in which the punish-

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ment shall be by fine, and the maximum does not exceed two hundred dollars," etc. Gen. Laws 1876, p. 155, sec. 3.

By the section of the act last cited the Legislature conferred upon the County Court concurrent jurisdiction with the justices' courts to hear and determine the case at bar, if it did not already have jurisdiction to try it. See the case of Pat Solon, decided at this term of the court, *post*, p. 301.

The next question to determine is this: Is that part of article 6512, Paschal's Digest, which relates to the forfeiture of the pistol constitutional? The assistant attorney-general calls our attention to section 23, article 1, of the Constitution, and insists that it enlarges the power of the Legislature to regulate the keeping, the bearing, and the wearing of arms, with a view to prevent crime; and that, under the power conferred by this section, the Legislature could provide such regulations and declare such penalties as it saw proper, provided such punishment was not cruel or unusual.

Section 23, article 1, of the Constitution is as follows: "Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power by law to regulate the wearing of arms, with a view to prevent crime."

We believe that portion of the act which provides that, in case of conviction, the defendant shall forfeit to the county the weapon or weapons so found on or about his person is not within the scope of legislative authority. The Legislature has the power by law to regulate the wearing of arms, with a view to prevent crime, but it has not the power to enact a law the violation of which will work a forfeiture of defendant's arms. While it has the power to regulate the wearing of arms, it has not the power by legislation to take a citizen's arms away from him. One of his most sacred rights is that of having arms for his own

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defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation.

The act under consideration contains other useful and salutary provisions which have been held not obnoxious to any just constitutional exceptions by a long line of decisions in this State, and which are capable of being executed independent of that part of it which is herein decided to be unconstitutional. Because the defendant, by the judgment of the County Court, on conviction was divested of his pistol, the judgment is reversed and the cause remanded.

Reversed and remanded.

PAT SOLON v. THE STATE.

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1. JURISDICTION OF COUNTY AND JUSTICES' COURTS. — Under the present Constitution and laws of this State, the County Courts and the justices' courts have concurrent jurisdiction of misdemeanors wherein the maximum fine does not exceed \$200. Note in the opinion the collocation and review of the constitutional and statutory provisions from which the above ruling is deduced.
2. JURISDICTION. — Courts cannot transcend the authority of the law of their creation, and are dependent on it for their jurisdiction and the extent of their powers. Their jurisdiction cannot be enlarged by intendment, so as to embrace objects not expressed in that law. Observe the application of this principle to certain acts of the Fifteenth Legislature, which seem to imply that justices of the peace have been invested with exclusive jurisdiction over a certain class of misdemeanors.

APPEAL from the County Court of Ellis. Tried below before the Hon. J. D. TEMPLETON, County Judge.

Albert Longley, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WHITE, J. This prosecution was a joint one against appellant and one T. W. Phelps, under the provisions of

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article 2011, Paschal's Digest, defining and punishing an affray, or the fighting together of two or more persons in a public place. The statute reads: "If any two or more persons shall fight together in a public place, they shall be punished by fine not exceeding one hundred dollars." The proceedings were begun by indictment, presented and filed in the District Court. That court afterwards transferred the case for trial to the County Court, and the trial and conviction from which this appeal is taken was had in the latter court.

On this appeal there is but a single question submitted for our adjudication; and inasmuch as it is made to appear most concisely in the third subdivision of the assignment of errors, we copy it as there stated, in these words, viz.: "The [county] court erred in rendering judgment herein, because the said County Court had no jurisdiction of the alleged offence at the time of the trial, the offence charged being a misdemeanor, the highest fine for which is and was one hundred dollars."

It is contended that, under the present system of laws now in force in this State, courts of justices of the peace have exclusive jurisdiction in all cases of misdemeanor, or where the fine to be imposed does not exceed \$200, and that, consequently, in all such cases the County Court has no jurisdiction to hear and determine them.

It is believed that this is the first case in which this isolated question has been clearly, fairly, and unequivocally presented since the adoption of the present Constitution, and the laws passed and now in force in pursuance of its provisions. Its determination must depend upon the construction to be given to the constitutional and legislative provisions conferring jurisdiction upon County Courts and courts of justices of the peace. We have encountered no little difficulty, in our efforts to harmonize these various provisions, in the solution of the proposition.

Beginning with the Constitution, when we look to the

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“Judicial Department,” as contained in article 5, we find that the sixteenth section provides that “the County Courts shall have original jurisdiction in all misdemeanors of which exclusive original jurisdiction is not given to the justice’s court, or may be hereafter prescribed by law, and where the fine to be imposed shall exceed two hundred dollars,” etc. Section 19 of the same article reads: “Justices of the peace shall have jurisdiction, in criminal matters, of all cases where the penalty or fine to be imposed by law may not be more than for two hundred dollars,” etc. So far as the Constitution is concerned, we have in these two quotations all that it contains relative to the jurisdiction of these two courts in misdemeanors.

It is evident that by neither is *exclusive* original jurisdiction conferred upon justices’ courts, though, as seen, the expression “exclusive original jurisdiction” is used in section 16 in connection with those courts. And the fact that the original jurisdiction of the County Court is limited in this sixteenth section to cases where the fine to be imposed shall exceed \$200 does not, as we conceive, deprive it of *concurrent* jurisdiction in cases where the fine to be imposed is less than \$200, except in those cases where exclusive jurisdiction was already given to the justices’ courts, or may be hereafter prescribed by law. If this view be correct, the Constitution simply leaves the matter of jurisdiction to be settled by the statute law in force at the time of its adoption, or as thereafter to be provided.

Under the law as it existed at the time of the adoption of the Constitution, justices’ courts had no exclusive jurisdiction in misdemeanors; nor was there any rule of practice in force by which they could try any such case upon indictment or information presented in the District Court. So much for this branch of the investigation. .

We must, then, necessarily look for such light as may be afforded by legislation subsequent to the adoption of the Constitution.

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On June 16, 1876, was passed the first act, after the adoption of the Constitution, which purported to define the exclusive jurisdiction of County Courts. We quote from the third section of this act, as follows: "The County Courts shall have original jurisdiction of all misdemeanors, except misdemeanors involving official misconduct, and except in cases in which the highest penalty or fine to be imposed may not exceed two hundred dollars," etc. Acts Fifteenth Legislature, 18, sec. 3.

This section was amended by the same Legislature, by act approved August 18, 1876, which amendment, so far as it embraces this subject, reads thus: "The County Courts shall have original exclusive jurisdiction of all misdemeanors, except misdemeanors involving official misconduct, and except such misdemeanors as are punishable by fine only, and in the punishment of which the highest fine to be imposed may not exceed two hundred dollars; that in cases where the offence charged is within the jurisdiction of the County Court, the court shall hear and determine the case, notwithstanding the proof may show an offence not within, but below, the jurisdiction herein conferred," etc. Acts Fifteenth Legislature, 172.

We freely concede that this latter clause would seem to imply that, according to legislative intent and understanding, there was a class of misdemeanors below the jurisdiction of the County Court. We propose, however, to show that this language, like that as used by the same Legislature in reference to this subject in other acts, was not characterized by that certainty which is usual in prescribing rules of conduct for determining and defining the organization and powers of our inferior courts and courts of limited jurisdiction, — as, for instance, by the act approved July 19, 1876, which is entitled, "An act to provide for the transfer of business, civil and criminal, pending in the District Courts, over which jurisdiction is given by the Constitution to the justices' courts, to the several justices' courts of this State."

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It is provided in section 1 “that all causes, civil and criminal, now pending in the District Courts of this State, over which jurisdiction is given by the Constitution to courts of justices of the peace, be transferred to the justices’ courts of the respective counties, in the manner hereinafter prescribed.” Acts Fifteenth Legislature, 48.

Again, in section 16 of an act to define and regulate the duties of county attorneys (Acts Fifteenth Legislature, 87), providing the procedure preliminary to the preparation of an information, the following language is used: “If the supposed case is one exclusively within the jurisdiction of a justice of the peace, the *subpœna* shall be returnable to the justice of the peace in whose precinct the offence was committed,” etc. We also concede that these statutes seem clearly to intimate that there is a class of misdemeanors which would fall exclusively within the supervision, control, and jurisdiction of justices’ courts.

Now, it is a familiar principle that courts established by the written law are dependent for their jurisdiction and extent of power upon the law of their creation, and they cannot transcend its authority. Their powers cannot be enlarged by intendment, so as to embrace objects not expressed in the law. *Ex parte Bollman*, and *Ex parte Swartwout*, 4 Cranch, 75; *Thatcher v. Powell*, 6 Wheat. 119; *Baker v. Chisholm*, 3 Texas, 157; *Cowan v. Nixon*, 28 Texas, 231.

From the quotations which we have made above, as heretofore stated, no express exclusive authority or jurisdiction has been conferred, in any class of misdemeanors, upon justices’ courts by the Constitution; and, so far as the statutes quoted are concerned, the exclusive jurisdiction contended for can only be derived from them, as we have seen, if at all, by intendment alone.

It now remains to be ascertained whether any such exclusive jurisdiction was conferred when the Legislature were

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considering and defining the power and authority of justices' courts. On this point we are not left in doubt. In an act entitled "An act to provide for the election of justices of the peace, and to define their powers and jurisdiction," approved August 17, 1876 (Acts Fifteenth Legislature, p. 155), the plain legislative intent and will upon the subject is set forth in the following unambiguous language: "Sec. 3. Justices of the peace *shall have and exercise original concurrent jurisdiction with other courts in all cases* arising under the criminal laws of this State, except misdemeanors involving official misconduct, in which the punishment shall be by fine, and the maximum does not exceed two hundred dollars." To our minds, this statute admits of only one construction, and that is that in all criminal cases where the punishment shall be by fine, and the maximum fine shall not exceed \$200, the power to hear and determine is *original and concurrent*, but by no means *exclusive*, in justices' courts.

Our conclusion is that the County Court and the justices' courts *each* have jurisdiction to hear and determine misdemeanor cases where the maximum fine does not exceed \$200. The apparent contradictory doctrine stated in *Tuttle v. The State*, 1 Texas Ct. App. 364, is not authority upon this point, since this was not the question involved in that case.

The judgment of the County Court is affirmed.

Affirmed.

A. R. LOGAN v. THE STATE.

1. ILLEGALLY PRACTISING MEDICINE. — Informations for this offence need not allege that the accused does not come within the exceptions specified in the provisos to the fifth section of the act of August 21, 1876, "to regulate the practice of medicine." Those exceptions are matter of defence. Note, in the opinion, an information held sufficient.

Argument for the appellant.

2. **MEDICAL EXAMINERS.** — The Constitution of 1876 expressly empowers the Legislature “to pass laws prescribing the qualifications of practitioners of medicine in this State.” *Held*, that this provision enabled the Legislature to authorize and require each district judge to appoint a board of medical examiners for his district, as provided for in the third section of said act. And, irrespective of this express constitutional provision, the general police power vested in the Legislature sufficed for the purpose.
3. **THE POLICE POWER** contemplates systematic precautionary legislation for the prevention either of crimes or calamities, and extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within the State.
4. **CONSTITUTIONAL LAW.** — In determining whether an exercise of the police power by a State Legislature is warranted by the Constitution of the State, the rule is to look to the restrictions and limitations imposed on the Legislature by the Constitution, and not to the express grants of legislative power.
5. **CHARGE OF THE COURT.** — The act of August 21, 1876, “to regulate the practice of medicine,” did not take effect until ninety days after that date; and, therefore, in a trial for a violation of its provisions, it was error to instruct the jury for conviction if they found that the accused, without complying with its requirements, had practised *at any time after its passage*.

APPEAL from the County Court of Dallas. Tried below before the Hon. R. H. WEST, County Judge.

The fine imposed on the appellant was \$250.

Thurmond & Willard, for the appellant. The law provides that the appointment of the members of such board shall be by the several district judges in their respective districts. The law, so far as it confers the appointing power upon the district judges, is unconstitutional and void, and under it no legal board can be organized. The Constitution of this State divides the power of the government into three departments, — legislative, executive, and judicial, — and prohibits persons of one department from exercising the functions of the other departments. The appointment of medical examiners is not a judicial function.

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It belongs to the executive department of the government.
Case of Supervisors of Elections, 114 Mass. 247.

The law having failed to provide for the organization of a legal board of medical examiners, and there being no person, officer, or board authorized to grant certificates of qualification, the law stands inoperative until a legal board of medical examiners is provided by law.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was tried and convicted in the County Court for an alleged violation of the act of August 21, 1876 (Gen. Laws Fifteenth Legislature, 321), entitled "An act to regulate the practice of medicine." The information charges as follows :

"The State of Texas, }
"County of Dallas, }

"In the name and by the authority of the State of Texas, now comes George N. Aldredge, county attorney of Dallas County, State of Texas, and presents in and to the County Court of Dallas County, State aforesaid, that one A. R. Logan, on the 19th day of May, in the year of our Lord one thousand eight hundred and seventy-seven, with force and arms, in the county and State aforesaid, did unlawfully practise medicine, without complying with the laws regulating the practice of medicine; without furnishing to the clerk of the District Court of Dallas County, State of Texas, a certificate of qualification, as required by law; and without having been regularly engaged in the practice of medicine, in any of its branches, in this State five consecutive years prior to the 1st day of January, in the year of our Lord one thousand eight hundred and seventy-five; and without then and there being a person authorized by law to

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practise medicine, and without then and there having and possessing the requisites required by law to practice medicine in the State of Texas, as required by law; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

“GEORGE N. ALDREDGE,
“County Attorney of Dallas County.”

The evidence was the following, as agreed to and certified by the county judge:

“First. The defendant practised medicine in the county of Dallas, State of Texas, after the act of August 21, 1876, went into effect.

“Second. That the defendant never filed with the clerk of said county a diploma, or a certificate of qualification from the board of medical examiners.

“Third. That a board of medical examiners was duly appointed for the Eleventh Judicial District, under the law of August 21, 1876, and the defendant went before them, was examined, and rejected.

“Fourth. That at the time of the passage of the act of August 21, 1876, the defendant was practising medicine in this State for a livelihood, and had been so practising medicine in this State for several years just prior to the passage of said act, and had, prior thereto, attended a regular course of study and lectures at Rush Medical College, and received the degree of *Doctor of Medicine*; that said college is a regularly established and well accredited medical college, duly and legally incorporated under and by virtue of the laws of the State of Illinois, and situated at Chicago, in said State.

“Fifth. That, in the year 1869, defendant received a diploma from said medical college, duly signed and executed by the proper officers of said college, and said diploma is in the words and figures following, to wit: ‘To all to whom these presents shall come, president, trustees, and professors

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send greeting: Whereas, it is an established usage to confer academical degrees on those whose character and knowledge entitle them to respect and confidence, know ye that Augustus R. Logan, having complied with the requirements of our college, and given ample evidence of his learning and skill, we have, by the authority of the State of Illinois, conferred on him the degree of *Doctor of Medicine*, together with all the rights and privileges thereunto belonging. In testimony whereof, we have granted this diploma, signed with our hands, and sealed with the seal of our college. Done at Chicago, this third day of February, Anno Domini, one thousand eight hundred and sixty-nine, and of American Independence the ninety-third.'

[Signed by the president, secretary, trustees, and professors of said college, in due form.]

"Sixth. That during all the time defendant practised medicine in the State of Texas he held said diploma, both before and after the passage of the act of August 21, 1876, but it was never filed by him with the clerk of the District Court of said county.

"Seventh. It is further admitted that the defendant practised medicine in the county of Dallas, State of Texas, after he had been examined and rejected by the board of medical examiners organized under the act of August 21, 1876.

"Eighth. It is further agreed that the board of medical examiners of the Eleventh Judicial District is composed of men holding diplomas, which have been duly recorded by the clerk of the District Court of the proper county, and that they have no other certificate of qualification."

Motions for a new trial and in arrest of judgment were made and overruled, and an appeal is prosecuted to this court upon the following assignment of errors:

"1. The court erred in its charge to the jury, as shown in bill of exceptions No. 1.

"2. It was error for the court to charge the jury that the

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defendant was not qualified to practise medicine for a livelihood, under the act of May 16, 1873, unless he had filed his diploma with the clerk of the District Court of Dallas County, Texas.

“ 3. The court erred in overruling defendant’s motion for a new trial.

“ 4. The court erred in overruling defendant’s motion in arrest of judgment.”

Inasmuch as the questions raised by the motion in arrest go to the foundation of this prosecution, the fourth ground of error assigned, to wit, the overruling of the motion in arrest of judgment, first claims attention.

The grounds of the motion are: 1. The information is insufficient in law. 2. The information charges the defendant with no offence known to the laws of the State of Texas. 3. The information does not charge that the defendant resided ~~or~~ sojourned in the county of Dallas. 4. The information does not charge that the defendant had not already been qualified for the practise of medicine under the act of May 16, 1873.

The argument in support of this assignment of errors appears to be, *first*, that the information should have charged the proper negative averment that the accused did not come within any one of the *provisos* set out in the statute creating the offence charged; and, *secondly*, that the provisions made in the third section of the act for the appointment by the judges of the District Courts of the several judicial districts of boards of medical examiners are unconstitutional, inoperative, and void; or, as stated in the brief of counsel, “the law having failed to provide for the organization of a legal board of medical examiners, and there being no person, officer, or board authorized to grant certificates of qualification, the law stands inoperative until a legal board of medical examiners is provided by law.”

We are of opinion that neither one of these positions is

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tenable. The people of this country have long realized the necessity of legal protection against incompetents and pretenders in the practice of medicine, and of providing some means for inquiring into the qualifications of those who claimed to possess the necessary prerequisites to practise among all classes this important profession. At a very early day, whilst Texas was an independent republic, the Congress provided by law for the creation of a board of medical censors, for the examination of those who desired to practise the healing art. This law, however, after remaining upon the statute-books a *dead letter*, was finally repealed. Again, in 1873, the Legislature passed an act entitled "An act to regulate the practice of medicine." Gen. Laws 1873, p. 74.

Not being satisfied with this, the people of the State, when assembled in convention, through their representatives, to frame a Constitution, provided as follows :

· "The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State." Gen. Prov., art. 16, sec. 31. And under the authority of this constitutional warrant the law now in force, and under which this prosecution was had, was enacted.

The statute declares (sec. 1) that no person shall be permitted to practise medicine * * * in this State without first having a certificate of qualification from some authorized board of medical examiners, as hereinafter provided. (Sec. 2) That every person who may hereafter engage in the practice of medicine, in any of its branches or departments, in this State shall, before entering upon such practice, furnish to the clerk of the District Court of the county in which such practitioner may reside or sojourn his certificate of qualification. (Sec. 3) That the presiding judges of the District Courts of the several judicial districts shall, at the first regular term of their courts after this act shall have become a law, or as soon thereafter as practicable,

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severally appoint a board of medical examiners for their respective districts, to be composed of not less than three practising physicians of known ability, and having certificates of qualification under the "Act to regulate the practice of medicine," passed May 26, 1873. * * * It shall be the duty of said board of medical examiners to examine all applicants for certificates of qualification to practise medicine, in any of its branches or departments, in this State, whether such applicants are furnished with diplomas or not, upon the following named subjects, to wit: Anatomy, physiology, obstetrics, chemistry, pathological anatomy, and pathological surgery; said examination to be thorough. When said board of medical examiners shall have been satisfied as to the qualifications of said applicant, they shall grant a certificate to that effect, which certificate shall be recorded with the clerk of the District Court of the county in which said applicant may reside or sojourn, as provided for in section 2 of this act, which certificate shall entitle him to practise anywhere in this State. * * * (Sec. 5.) That any person violating any of the provisions of this act shall be guilty of a misdemeanor, and, on conviction thereof before any court having competent jurisdiction, shall be fined in any sum not less than \$50 and not more than \$500.

It should be noticed, in this connection, that by section 6 the act of 1873 is repealed; so that this prosecution must stand or fall by the provisions of the act of August 21, 1876.

We are of opinion that all of the provisions of the act under consideration, as above set out, and independent of any constitutional warrant for its enactment, would be maintainable under the police power of the State; that, under this general power, the Legislature is the proper judge as to what regulations are demanded in dealing with the property and restraining the actions of individuals. On this subject it is said: "The police of the State, in a compre-

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hensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve public order and prevent offences against the State, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to ensure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with the like enjoyment of the rights of others." Cooley's Const. Lim., marg. p. 572.

Police is a general system of precaution, either for the prevention of crimes or calamities. "This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo ut alienum non lædas*, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." Id. 573, and cases there cited.

"And, again, [by this] general police power of the State, persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the Legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." Id. 574, marg. p., and authorities there cited.

On these authorities (and they might be extended), we are of opinion the Legislature could well have anticipated the great danger likely to result to the people of the State, who cannot be supposed to be competent to judge of the qualifications of those who hold themselves out as qualified to practise this most abstruse profession, and to provide by law a means by which they might have some protection for the comfort, health, and even the lives of the people against

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those who propose to administer to their necessities, afflictions, and misfortunes without the necessary study and preparation. How much more so, then, must the necessity exist, and how much more forcible the argument, when we bear in mind the special grant of authority in the Legislature to enact the law, as found in the constitutional provisions above quoted. For some of the applications of these rules, see *Ex parte Cooper*, 3 Texas Ct. App. 489, and authorities there cited; *Davidson v. The State*, 4 Texas Ct. App. 545.

In the construction of an act of a State Legislature with reference to its constitutionality, the rule is to ascertain whether the Legislature is restricted or limited in its action by any provision of the State Constitution, and not for a grant of power, as in the Constitution of the United States; and if there is no restriction, generally, the courts uphold the act. *Ex parte Mabry*, decided at the present term, and authorities there cited, *ante*, p. 93.

We are unable to see the force of the argument that the district judges have no power to appoint the board of medical examiners, as provided in the third section of the act of August 21, 1876. These boards are not officers in any constitutional sense, that we can perceive, but merely appointees. The law gives the authority to make the appointment, and the Constitution does not prohibit it, so far as we have been able to discover; and, therefore, we hold that this authority must be maintained as set out in the act. The mode of proceeding under the law required the appointment of these examiners, and we see no reason why the Legislature could not bestow the power to appoint upon the district judges.

In the case of *Blasdel v. The State*, decided at a former day of the present term, we had occasion to examine the statute under consideration, with reference to the provisos appended to the fifth section, and, after a consideration of the

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authorities, we there held “that these provisions are not necessarily to be construed as within the enacting clause; that any act which would violate the provisions of the *act* could be set out substantially in the language of the act, without noticing the matter contained in the *provisos*; and, therefore, in declaring upon the statute, either by indictment or information, it would not be obligatory upon the pleader to negative by averment any person or matter embraced in the *provisos*, or either of them; and that the matters embraced in the *provisos* are properly matters of defence.”

This, we are of opinion, is a correct interpretation of the statute. To our minds, one main ground of the general rule, which is conceded to be a correct one, — “that when an offence is created by statute, and there is an exception in the enacting clause, the indictment must negative the exception,” — is that, in declaring upon a statute, the indictment should set out the offence in the language of the statute, unless something further enters into the offence, in order to avoid a variance between the statute and the indictment; and if the words of the statute properly designate the offence, and can be so pleaded without creating such variance, the proviso need not be negatived. See the case, and authorities there cited, *ante*, p. 263.

If the accused in the present case was within these *provisos* of the statute, he could have pleaded that fact in defence, or he could have given it in evidence under the plea of not guilty. It is conceded that this construction may work hardship in isolated cases, yet it is believed that it does not deprive any one of any legitimate defence; and that any hardship or inconvenience parties may be subjected to will be greatly overbalanced by the benefits resulting from the act, by the protection it will afford against permitting any but those who are properly qualified to practise a profession so liable to abuse, and which the community

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generally are so utterly disqualified to protect themselves against. The act is believed to be in harmony with the Constitution, and should be enforced.

We are of opinion that the court did not err in overruling the motion in arrest of judgment.

The motion for a new trial is based upon the evidence, and because the verdict is contrary to law, and supposed error in the charge of the court, and that the amount of the fine imposed is excessive. The evidence, as above set out, is amply sufficient to support the finding of the jury, and the verdict is lawful. With reference to the charge of the court, it is stated in a bill of exceptions taken on the trial that the court, on its own motion, charged the jury as follows: "The defendant could only be qualified to practise medicine, under the act of 1873, in one of two ways: First, by filing his diploma with the clerk of the District Court of the county; second, by filing with the clerk of the District Court a certificate of qualification from the board of medical examiners of the county. And if he failed to file with the clerk of the District Court a diploma or a certificate of qualification prior to the passage of the law of August 20, 1876, then he has not qualified to practise medicine under the act of May 26th, 1873. And if you further find from the evidence that the defendant has practised medicine in the county of Dallas, State of Texas, since the 20th day of August, 1876, without first filing with the clerk of the District Court of Dallas County a certificate of qualification from the board of medical examiners of the Eleventh Judicial District, then you will find him guilty, and assess his punishment," etc.

The charge makes the guilt of the defendant to turn, in part, at least, upon the question whether the defendant had practised medicine in Dallas County since August 20, 1876, and without having a certificate of qualification from the board of examiners provided by the act of August 21, 1876. (The date, as mentioned in the bill of excep-

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tions, is August 20, 1876, which, we suppose, was intended for the date of the passage of the act, which appears to have been approved on August 21, 1876.) This, in our opinion, was error. The act, whilst it was approved on August 21, 1876, did not go into effect until ninety days after the adjournment of the Legislature, which, agreeably to the certificate of the Secretary of State appended to the General Laws of 1876, took place on August 21, 1876; and so, the act was not in force at the time mentioned in the charge of the court. It was, therefore, not the law of the case to make the guilt of the accused depend upon his having violated that act before it went into operation; and, for this reason, the judgment must be reversed and the cause remanded.

Reversed and remanded.

G. S. SMITH v. THE STATE.

NEW TRIAL. — In a prosecution under the "Act to regulate the practice of medicine" (Gen. Laws 1876, p. 231), the accused may prove his exception under the *provisos*, and it was error to refuse an application for a new trial based upon the exclusion of such evidence.

APPEAL from the County Court of Cameron. Tried below before the Hon. H. KLAHN, County Judge.

Powers & Maxan, for the appellant.

George McCormick, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was prosecuted in the County Court for having violated the provisions of the act of August 21, 1876, entitled "An act to regulate the practice of medicine." Gen. Laws 1876, p. 231.

The specific act of violation charged in the information is

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that the accused, in the county of Cameron, and State of Texas, “did then and there engage in the general practice of medicine, including the department of surgery, without, before entering upon such practice, then and there furnishing to the clerk of the District Court of Cameron County, Texas, of which said county said George S. Smith is a resident, his certificate of qualification, as required by the act to regulate the practice of medicine, approved August 21, 1876.”

The defendant pleaded not guilty; and from all we can gather from the statement of facts and exceptions to the evidence taken at the trial, and from the brief of counsel for the appellant, the accused rested his defence upon proving that he came within one of the provisos to the first section of the act, as follows: “*Provided*, that nothing in this act shall be so construed as to apply to those who have been regularly engaged in the general practice of medicine in this State, in any of its branches or departments, for a period of five consecutive years in this State, prior to the first day of January, 1875.”

Had the accused made good by evidence the fact that he came clearly within this *proviso*, he would have been guilty of no violation of the act in question, and have been entitled to an acquittal. He was entitled to make this proof under his plea of not guilty. *Blasdell v. The State*, and *Logan v. The State*, decided at this term, *ante*, pp. 263, 306.

Whether wisely or unwisely, the law permits those to practise who have been regularly engaged in the general practice of medicine in this State, in any of its branches or departments, for a period of five consecutive years in this State, prior to January 1, 1875, without diploma, certificate of a board of medical examiners, or any other evidence of qualification whatever.

By the evidence adduced, and by testimony improperly excluded, the accused would, if the court had permitted him,

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have made good his defence that he had practised medicine the length of time required to exempt him from punishment. It was error for the court to construe the law to mean anything else than what the language clearly imports.

The court below erred in overruling the defendant's motion for a new trial, and for this error the judgment must be reversed and the cause remanded.

Reversed and remanded.

W. H. McCLACKEY v. THE STATE.

1. EVIDENCE — INSANITY. — Insanity being a legal defence, testimony bearing upon the mental condition of the accused at the time of the alleged offence should be admitted in evidence. And not only professional or expert witnesses, but non-professional witnesses, will be permitted to give their opinions on this question, together with the facts and circumstances upon which their opinions are founded.
2. INDICTMENT. — It is urged by appellant that the indictment is defective because it does not show that the grand jury was empanelled in the State of Texas; because in the charging clause it does not connect the pistol and the appellant by the use of the word "with;" and because it alleges that the "leaden balls were shot off," instead of the pistol. These objections are not well taken. The material allegations are sufficient to sustain the indictment.

APPEAL from the District Court of Hood. Tried below before the Hon. J. R. FLEMING.

Seven years' confinement in the penitentiary was assessed against appellant for the murder of Samuel Hunter, in Hood County, Texas, on May 25, 1875. The evidence upon which he was convicted being almost entirely circumstantial, a brief synopsis of the most pertinent is given below.

The State, by the witness Pinson, showed that at the time of the killing, appellant lived in Hood County, on the north side of the Brazos River, as it then ran; that the

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deceased lived in what was known as De Cordova's Bend, on the west side of the river; and that in going from the deceased's neighborhood to one Matlock's, one would naturally travel the road leading by the house of the appellant. The distance from the house of deceased to that of the appellant is about one mile. Mr. Matlock lived some three or four hundred yards from the appellant, in an opposite direction from deceased's house, the road running near the appellant's front gate. There was another road going around next to the river, but the road spoken of is the most generally travelled, and both are neighborhood roads.

The day after the killing, witness saw the body of deceased, dressed and laid out at the house of appellant. The house fronted rather to the south, and the gate stood some eight or ten steps from the door, and the wagon-track of the road was some twenty steps from the gate. Witness noticed several bullet-marks on the bush, near the road. The ground between the larger part of the front fence and the road was open, but there was a small bunch of live-oaks to the left of the gate, going out. The ground on each side of the enclosure south of the road was bushy, and there was a ravine near the south-east and south-west corners of the lot, and running from the south-west corner towards Matlock's. This was densely wooded by a thicket. There is a live-oak sapling standing south-east, and on the other side of the road from this thicket. Witness noticed two bullet-marks in this sapling, about six feet from the ground; and a line drawn from these marks would miss the gate spoken of, and enter the thicket on the south-west corner of the lot, towards Matlock's.

About a month after the killing, and while the appellant was out on bond,—not under arrest,—he was with witness in the harvest field, and got to speaking of his troubles; among them his troubles with Hunter, the deceased. A remark appellant made drew from witness the remark that

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he thought appellant, a few days before the killing, went to deceased's house and talked over the difficulty, spending most of the day, making friends, and afterwards expressing as much esteem for deceased as any acquaintance appellant had; to which the appellant responded, "That's so." Witness further remarked that he had also learned that from that time appellant had not seen deceased until the day of the killing; to which also appellant responded, "That's so." Witness then said appellant had done "mighty wrong;" to which he responded that deceased's "life has been stolen away from him."

Witness and appellant then went up to witness's house for a pistol-scabbard for which appellant had come, and on asking him whose scabbard it was, the appellant answered that it "belonged to Smith." Witness knew of no man living in the neighborhood named Smith. Appellant put the scabbard on his belt, and in it put his pistol, which he was wearing. It was a new scabbard, and the one appellant had used before was a worn-out one. On the day of the funeral, — after it was over, — witness came by appellant's, and his wife put the clothes of deceased in witness's wagon, to be taken to the family of deceased. Among them was found the scabbard, which, not being claimed as deceased's, was carried back to witness's house.

State's witness Carmichael testified that he arrived on the ground late in the evening that the deceased was killed. He went there by Matlock's house, and there found appellant with a bullet-wound in one arm. When he got to appellant's house, he found deceased lying on his face, dead, near a small clump of bushes. His head was lying towards appellant's house, and he had his pistol grasped in both hands, full-cocked, with his forefinger on the trigger, pointing towards the house of appellant, with the barrel resting on a twig of a small bush that had been some time cut down. As one of the jury of inquest, witness found

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several wounds on the body of deceased, — one, evidently made by a pistol-ball, in the side, one of a pistol-ball in the hip, and several in the thigh, evidently made by smaller shot than the other two. These wounds were all on the left side. The body was found at a small clump of bushes east of the gate, and opposite from Matlock's house, and near the south-east corner of the fence. The witness then describes the ground, etc., as the witness Pinson; as, indeed, do all the witnesses. Proceeding, the witness says he examined the ground around, and found the tracks of deceased's horse regular, as though in a walk, until it got opposite or in front of the house, where it showed that the horse had made a sudden spring, plowing the ground with his hoofs and "cutting up" a great deal, and showed to have kept up several yards, to near where deceased's body was found. An examination showed one barrel of deceased's pistol discharged; the others were charged, and the caps were bright. The bullet-marks in the sapling were fresh, and in a line from the thicket. Witness also noticed bullet-marks on bushes near the ground, the splinters on which pointed to the ravine in a south-western direction, towards the thicket. Witness found a breech-loading carbine tied to the saddle of the deceased, in which were all the cartridges. Also found with the saddle a pair of saddle-bags, in which were one six-shooter and one, perhaps two, derringers, all loaded.

Martin Matlock, for the State, swears that he and his brother Jesse were at work in the field of his father, some 300 or 400 yards from the house of the appellant, on the evening in question. About two hours by sun, deceased came into the field on horseback, having his gun strapped to his saddle, and in the course of conversation said that he had just ridden past the house of appellant. From where they were, deceased's nearest way home would have been eastward, and by the house of appellant. He left the wit-

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ness and brother shortly ; and in a few minutes, about long enough for him to have reached the house of appellant, witness heard six shots, the first louder and more distinct than the others. Soon afterwards the horn blew at witness's house, and on going up he found the appellant there with a wound in his arm. Witness then learned that deceased had been killed. While saddling his horse to go for a justice of the peace, witness noticed one Rash holding the same horse deceased was riding in the field. The horse was wounded in the left flank. Just before witness started, the appellant said that the deceased had charged him (appellant) at his gate, and he (appellant) had shot deceased, and had been shot by deceased. Witness states that on the Sunday before the killing, appellant passed the house of witness with a pistol, which he said one Brown had furnished him ; and two or three days before the killing, appellant proposed to witness and his brother Jesse to exchange some large shot, about the size of pistol-balls, for smaller ; did not have them to exchange. When deceased left witness in the field, he said he was going home. In doing so, his left side would be presented to the house of appellant.

The testimony of Jesse Matlock is the same as that of his brother, except that he went to the body on hearing of the killing, and found it as it was described by Carmichael, — holding the pistol, etc. When proposing to swap shot, appellant did not say he wanted the smaller shot to shoot crows with.

W. M. Rash testified to being the first, with his brother, S. A. Rash, to reach the ground after the killing. He found the body as described by Carmichael and the Matlocks, in regard to the position of the body, the pistol, the ground, etc.

The testimony of Martin and Barnard is immaterial, except that, passing appellant's house about two hours before the shooting, they saw the horse of one John Tingley hitched

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to some brush about fifty yards from the house, and another horse, in plow gear, standing in appellant's enclosure. Shortly afterwards, returning the same way, they heard shooting, — as many as six reports, — the first loudest, and heard some one exclaim, Oh ! Lord ! Oh ! Lord ! repeating from the time of the second shot to the fourth. Afterwards two other reports were heard by witness.

H. Howard, for the State, testified that he heard appellant talking to one Brown, in the store of McCarty & Brown, in Acton, Hood County, Texas, on the Saturday morning before the killing. Appellant was excited, and said that deceased had accused him (the appellant), Tingley, and Ledbetter of knowing where his (deceased's) stolen horses were, and that deceased went desperately armed ; to which Brown responded that if a " fight is what he wants, we have got as good arms as he has."

Witness Holt saw the appellant loading his large-bored double-barrelled shot-gun, at Rash's, on the Tuesday before the killing. To appellant's question of " How much powder do you put in to kill an old buck ?" witness replied, " A little more than you have in your hand ;" and at his (appellant's) request, directed him also as to the amount of buckshot to put in for the same purpose. Did not stay to see appellant put shot in.

The testimony of William Matlock corroborates the others as to the position of the body, the ground, and wounds ; and adds that, on the morning after the killing, appellant told him that the scalp-wounds on deceased's head were inflicted by him (appellant) with the ramrod part of his pistol.

S. A. Rash, for the appellant, corroborates the State's witnesses as to position of the body when found, etc., and adds that he had heard deceased threaten that if appellant came over into De Cordova Bend, where he (deceased) lived, to cultivate land, he (deceased) would tie appellant up, whip

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him, and cut his throat from ear to ear; and further, that deceased had said that he intended to build a church in the Bend, and that if appellant ever came over there to preach, he (deceased) would quirt the appellant until he would dance in the sand. Witness told appellant that if a man meant anything by what he said, he (appellant) had better watch deceased. Witness said that on approaching the subject of making peace between the two, he once told the deceased that appellant did not want to do him (deceased) any harm, and that appellant had once said he (appellant) would rather pray for him (deceased) than to hurt him; to which deceased responded, "Yes, G—d d—n him, he has never had a bullet put right there yet," and pointing to his forehead. Witness never told appellant what deceased said about him (appellant), and never heard deceased make any direct threat to kill appellant, nor did witness ever tell appellant of any.

Tingley, for the defence, said that on the day of the killing he was on his way to his father-in-law's, across the river, and as he neared the house of appellant he met appellant coming from his field, and went with appellant into his (appellant's) house, and took a seat. Shortly appellant got up and went out in front, and in a few minutes witness heard talking, but did not distinguish what was said. He then heard a shot, and heard appellant exclaim, "I am shot." Witness jumped up and ran out and away. Going out, he saw deceased on his horse, trying to get his gun loose. Saw appellant with blood on his arm. Did not see appellant have any arms at the time. Thinks deceased shot appellant.

On cross-examination: The witness does not remember whether he hitched his horse to bushes or the fence. Appellant had a double-barrelled shot-gun when he met him going to the house from the field, which he put down outside the fence. Don't remember on which side of the gate.

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W. B. Glenn, for appellant, stated that on Monday or Tuesday before the killing he was riding along the road with deceased, and talking with him. Deceased was cursing and abusing Tingley, appellant, and others, but chiefly appellant, whom he said that he (deceased) intended to whip, if he (deceased) ever caught him over in the Bend. Deceased said, further, that appellant had never had a bullet put in his forehead, and never would have, as he (appellant) was too d—d a coward. When witness usually saw deceased, he was generally armed. Never told appellant of these things, and never heard any direct threats from deceased. Considers that deceased was a brave man, with a little backing, and quick to resent an insult.

Witnesses W. B. Glenn, E. Y. Brown, Carmichael, H. Wilson, and S. A. Rash testified that appellant's reputation was that of a peaceable and quiet man, and that of deceased as violent and dangerous, and generally armed when seen by witnesses.

During the trial the defence offered to prove by E. Y. Brown that he had known the appellant since June, 1873, and considered him crazy, basing this opinion on the general conduct and dealings of the appellant, who would forget his promises, and when reminded of them, would seem as if in a dream. The counsel for the State objected to this testimony, on the ground that the witness was not sufficiently acquainted with the habits and character of the appellant to give an intelligent opinion, and because the witness stated conclusions, and not facts, as the basis of his opinion. The court sustained the objection, and excluded the testimony; to which ruling the defence excepted at the time, and afterwards assigned the ruling as one of the causes in the motion for a new trial.

J. S. Wood, for the appellant.

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George McCormick, Assistant Attorney-General, for the State.

Thomas W. Dodd, also for the State. The evidence of Brown was an attempt to establish insanity, etc.

We submit that the reasons given by the court below in certifying the exception are well sustained by the best established rules of evidence; and that the ruling of the court was not error, for the further reason that the evidence ruled out did not even tend to relate to the condition of the mind of appellant at the time of the commission of the offence; and, moreover, only tends, to give it the most liberal construction, to show that appellant was a man of rather a weak mind, a bad memory, etc. In no sense were the reasons or conclusions of the witness based upon such facts, within his knowledge, as would have justified the court in submitting the issue of insanity to the jury.

WINKLER, J. It is shown by a bill of exceptions that on the trial below, the appellant, under the plea of not guilty, attempted to prove that at the time of the alleged perpetration of the crime for which he was then being tried he was insane, or, as expressed by the witness, *crazy, or not sound in mind*; and that after a witness had been examined on the subject, and as to his means of information, the testimony, on motion of the district attorney, was by the court excluded from the jury, on the ground, as stated in the bill of exceptions, "that the witness was not sufficiently acquainted with the habits and character of the accused to give an intelligent opinion; and, also, because the witness could not state any facts upon which his opinion was based, but only stated conclusions."

We are of opinion that it was error to exclude this evidence from the jury. Instead of pursuing this course, the

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testimony should have been admitted, to be considered by and passed upon by the jury, under a proper instruction by the court.

It is provided by the Penal Code (art. 41) that no act done in a state of insanity can be punished as an offence. Pasc. Dig., art. 1643. And by the Code of Criminal Procedure (art. 497) it is provided that, under the plea of "not guilty," *evidence to establish the insanity of the defendant may be introduced*. This being a recognized matter of defence, whatever of evidence was offered on the question of insanity should have gone to the jury under the plea of "not guilty," together with the other facts which tended to acquit him of the accusation. Pasc. Dig., art. 2965.

The jury are the exclusive judges of the facts in every criminal case. Code Cr. Proc., art. 593. It is within the legitimate scope of the power of the judge to decide whether testimony offered is competent, and therefore admissible, or not; but if the testimony be admissible under the law and the pleadings, its effect upon the issue, together with its sufficiency, in order to establish the proposition for which it is offered, is properly for the consideration of the jury, and not the court.

Whilst the general rule is that witnesses must state facts, and not conclusions merely, it is well settled that on the question of insanity the general rule does not apply. On the contrary, it is now well settled in Texas, and in most of the other States of the United States, that on this question even non-professional witnesses may not only state facts tending to prove insanity, but may also express their opinions and conclusions upon the facts to which they testify; and the courts are not permitted to even discuss the facts in the charge to the jury. Code Cr. Proc. 595.

In *Thomas v. The State*, 40 Texas, 60, the court below refused to permit the witnesses to state to the jury their opinions of the defendant's mental capacity at the date

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of the alleged offence, and the witnesses were asked to state if they were acquainted with the mental *status* of the defendant, and their opportunity for such acquaintance. The court below ruled that the witnesses might state the facts and circumstances upon which their opinions were based, but not their opinions or belief; and on this subject the Supreme Court held as follows :

“ We think the witnesses should be allowed to give their opinions, together with the facts on which their opinions were based, when it appears that their acquaintance with the party will enable them to form correct opinions of his mental condition.” The learned judge, after discussing at some length the exceptions to the general rules of evidence, and the qualifications of those general rules, and giving examples of the qualifications, proceeds as follows : “ The analogy in the investigation of these questions, and other questions, when direct evidence is not attainable, has been applied to inquiries respecting the condition of a party as sane or insane, and the opinions of non-professional witnesses, together with the facts on which their opinions are founded, have been admitted in evidence.” See the case, and the authorities cited. In the case of *Thomas*, it was also held that the opinion was not in conflict with *Gherke v. The State*, 13 Texas, 568.

In a late case (*Holcomb v. The State*, 41 Texas, 125) the proposition decided and the conclusions arrived at appear from the following extract from the opinion of the Court : “ The court refused to permit the witnesses to testify to conduct of the defendant tending to show his mental deficiency, and who, for the length of time they had known the defendant, would appear to have had good opportunity of forming an opinion, to give their conclusions or opinions as to his mental soundness. In this we think there was error. The law is believed to be well settled that non-professional witnesses should be allowed to state their opinions as to the

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sanity of a party, as the result of their observations, accompanied with a statement of the facts observed ;'' citing 1 Greenl. on Ev., sec. 440, and Bishop's Cr. Proc. 676-680. See also *Stevens v. The State*, 31 Blackf. 486, and authorities there cited ; *Guagundo v. The State*, 25 Texas, 519.

It may be that, from some expressions to be found in the cases of Thomas and Holcomb, the court below might have understood that, on the question of sanity or insanity, it was within the province of the court to determine, upon the extent of the acquaintance and the sufficiency of the means of information, as to the facts stated upon which the conclusions of the witness were based, and to determine upon the admissibility of the evidence, and to admit it or exclude it, according as the facts should appear, as developed on the examination of the witness. If so, we are of the opinion that the conclusion was erroneous. The question of insanity being a recognized defence, whatever of legitimate evidence was offered, it should have gone to the jury.

The main question determined by these cases, as we understand them, is that, on the question of the sanity or insanity of the party accused, not only experts, but non-professional witnesses, may state their conclusions, from the facts within their knowledge, as to the mental condition of the party ; and that whether the means of information, or facts proved, or the conclusions drawn by the witness are of the satisfactory character required to base a finding upon, or not, is for the consideration of the jury, under proper instructions.

We are of opinion the court erred in excluding the testimony. And in view of the fact that the testimony, as shown by the record, was almost entirely circumstantial, the error was of sufficient materiality to warrant the reversal of the judgment.

We are of opinion that the objections urged against the sufficiency of the indictment are not well taken. They

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amount to about this: that an unimportant omission or mistake in an immaterial part of the indictment was made, either by the writer, or by the clerk in copying it into the transcript. The material parts of the indictment are deemed to be sufficient, and the court did not err in overruling the motion in arrest of judgment. Other errors are assigned which have not been considered, for the reasons that some of them are deemed of little moment, and others are not likely to arise on a subsequent trial. For the error above pointed out, the judgment must be reversed and the cause remanded.

Reversed and remanded.

ROBERT WYATT AND M. STANLEY v. D. C. BARMORE,
County Judge.

MANDAMUS—JURISDICTION OF THIS COURT.—As this court has no appellate jurisdiction over a judgment of a County Court rendered on appeal from a fine of less than \$100 imposed by a justice of the peace, it is not clear that it has jurisdiction, by *mandamus*, to supervise the action of the County Court in such cases, even when such action was purely ministerial. If such action was not ministerial, but judicial, this court is not invested with such supervisory power.

ORIGINAL APPLICATION to the Court of Appeals for a writ of *mandamus* to the county judge of Brazos County.

The case is fully stated in the opinion.

P. D. Page, for the relators.

George McCormick, Assistant Attorney-General, *contra*.

ECTOR, P. J. The relators, Robert Wyatt and Martin Stanley, have filed an application in this court for a peremptory writ of *mandamus* against the defendant, as judge

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of the County Court of Brazos County, to compel him to take jurisdiction of, and to proceed to judgment in his said court in a certain cause against the relators, wherein they are charged with a misdemeanor. Relators refer to and make part of their motion their application under oath to the County Court, and the transcript from the records of the County Court of Brazos County, containing the proceedings of said court in said cause, herewith filed.

The petition to the County Court substantially states that the relators were arrested on a charge of running a horse-race on a public highway in Brazos County; were carried before one Gus Brewer, a justice of the peace of Brazos County, tried, and convicted; that relators, knowing the charge to be false and frivolous, failed to employ counsel to defend them; that they were anxious then and there to secure a new trial, but were ignorant, uneducated men, and did not know how to proceed, and the justice did not instruct them how this could be done; that as soon as they could they employed counsel to secure them a new trial before the justice of the peace, or to appeal the case in the event they failed to obtain a new trial; that they repaired with their counsel to the place, and presented at the office of said justice (where his court was required by law to be held) a motion for new trial, and were prepared to give bond and perfect an appeal in the terms of the law; that the justice of the peace was not at his office, and refused to attend, or entertain in any shape the motion for new trial, but vacated his office after rendering judgment in the case. The motion for new trial was left on the justice's docket-book, together with notices of the appeal and appeal-bond.

The petition before the defendant, as county judge, set out in detail all the facts; and, in addition, avers a meritorious defence, and prayed for a *certiorari* to the justice, and for a writ of *habeas corpus* and enlargement on bail; and, in the

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alternative, for such other remedial writ or process as would secure to them their legal right of appeal. The petition was sworn to by the relators. The county judge indorsed on the petition a fiat granting the writ of *habeas corpus*, making it returnable on December 15, 1877, and also a fiat for a *certiorari* to the justice, in the usual form. The papers were duly served. The hearing under the writ of *habeas corpus* took place on December 17th, and resulted in releasing the relators on bail and docketing the cause for trial in the County Court. It was called for trial at the next regular term of the County Court, when the county attorney filed a motion to dismiss the cause, "first, because the same has been brought into this court without authority of law; second, because this court has no jurisdiction of this case." The motion, being heard and considered by the court, was sustained. The court ordered that the cause be dismissed for the want of jurisdiction, and that a *procedendo* be ordered to the justice of the peace to enforce his judgment in the cause.

Section 6 of article 5 of the Constitution provides that "the Court of Appeals, and the judges thereof, shall have power to issue the writ of *habeas corpus*; and, under such regulations as may be prescribed by law, to issue such writs as may be necessary to enforce its own jurisdiction." As the fine imposed by the justice of the peace was under \$100, it is admitted that this court has no jurisdiction of the cause on appeal. This being the case, it is by no means clear that this court has the supervisory power over the County Court to issue a peremptory writ of *mandamus*, even if the act complained of was only ministerial in its character. It was the duty of the defendant, as the presiding judge of the County Court, to pass upon the motion of the county attorney; and as his action thereupon involved judicial action, this court has no jurisdiction by *mandamus* to compel him to set aside the judgment of dismissal on the

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motion, and proceed to judgment in his said County Court. *Rains v. Simpson*, Sup. Ct. Texas, Tyler term, 1878; *Porter v. Klahn*, Texas Ct. App., Tyler term, 1878.

The application for *mandamus* is therefore refused, and the cause dismissed.

Ordered accordingly.

COURT OF APPEALS OF TEXAS.

GALVESTON TERM, 1879.

ANTONIO GARCIA v. THE STATE.

1. **PETIT JURORS.** — Section 26 of the jury law of 1876 makes it cause for challenge that a petit juror had “served for one week in the District Court within six months preceding, or in the County Court within three months preceding.” *Held*, that the word *preceding* has reference to a prior term of court, and that a previous week’s jury-service during the pending term is not cause for challenge.
2. **NEW TRIAL.** — Though improper to consider and overrule a defendant’s motion for a new trial when he is not present in court, such action may be corrected by setting it aside, and, when the defendant is present in court again considering and determining the motion.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The indictment was for the murder of Augustine Anallo, in Nueces County, on September 7, 1878.

The jury found the appellant guilty of murder in the first degree. The testimony, though brief, was to the purpose, and consistent in all material respects.

Juan Ariano testified, for the State, that himself and appellant resided on the ranch of R. Johnson, in Nueces County, being employed by the said Johnson in the capacity of shepherds. The deceased came to the ranch on Thursday, to see his children, as he stated, and, having obtained the consent of appellant, remained overnight. On the day following, after supper, the appellant and deceased, at the instance of appellant, walked away from the house together. Shortly, appellant returned alone, and on being asked where

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the deceased was, answered that he (appellant) had struck him (deceased) some blows, and that deceased was out at the sheep-pens.

Thereupon, Johnson told witness and appellant to go out and find deceased. Accordingly, they started; and after they had gone a short distance, appellant said to witness, "If I have not already killed him, I have a knife with which I can finish him." Witness took the appellant back to the house, and told Johnson what he had said; and Johnson took the knife from appellant, and then witness and appellant proceeded to the pens where deceased was, some three hundred yards from Johnson's house. They found him lying on the ground. Appellant took hold of deceased's hand, and, after feeling for his pulse, threw it aside and said, "The devil has got him."

Witness examined deceased, and found him quite dead. A blow from some blunt instrument had crushed in the skull. Witness then found an axe lying near, with blood on the helve, or handle. When witness went back and told Johnson, he (Johnson) tied the appellant. Appellant gave no reason why he struck deceased. Before leaving the house together, the deceased and appellant seemed very friendly, talking together, and eating at the same table together.

Testifying for the State, Feliciano Garcia stated, in the main, what was stated by the last witness, except that he (witness) accompanied the last witness and appellant when they went to hunt for deceased, as directed by Johnson. Saw appellant examining deceased, but did not hear him say "He has gone to hell," nor did he previously hear appellant say that if deceased was not dead he would finish him.

For the State, Manuella Ariano testified that she had formerly lived with deceased, and had several children by him. Witness had left deceased some time ago, taking her chil-

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dren, and for more than two months had been living with appellant. Was not married to deceased nor to appellant. Deceased stayed all night at the Johnson ranch, the night before he was killed, but witness did not speak to him. Witness slept with appellant that night.

R. Johnson, for the State, corroborates the testimony of the first two witnesses, and adds, that when he tied the appellant he told him that he (witness) could either shoot or hang him (appellant), as he (witness) pleased.

E. A. Atlee, for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

WHITE, J. The appeal in this case is from a judgment of conviction in the lower court for murder in the first degree, with the death penalty assessed.

During the trial, but two bills of exception were saved to the rulings of the court, viz.: first, with regard to the refusal of the court to sustain a challenge for cause to one of the jurors; and, second, with reference to the action of the court on the hearing of defendant's motion for a new trial.

It seems, as stated in the first bill, that on testing one of the jurors, as to his qualifications, he was challenged by defendant, upon the ground that he, the juror, had served as a juror in the District Court for one week within six months preceding. This challenge the court refused to allow, for the reason that the one week's service as rendered by the juror had been rendered at the then present term of court, and that the statutory rule invoked did not apply. Amongst the other causes of disqualification enumerated, "the fact that he has served for one week in the District Court within six months preceding," it is declared, "shall

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be a good cause for challenge" to a juror. Acts 1876, p. 83, sec. 26. Evidently the word "preceding," used in the statute, means service rendered at a term prior to and other than the one then being held. *Welsh v. The State*, 3 Texas Ct. App. 413.

To our minds this becomes clearly apparent when this section is considered in connection with other sections of the same act. In the eleventh section it is provided that "the court may discharge the regular panel of a jury after they shall have served one week; and any deficit in a panel shall be made up, when a selected jurymen is excused, or fails from any cause to attend on the day specified in the summons, from the original list returned by the jury commissioners, in the order in which their names are recorded in the said list." Acts 1876, p. 80. Here we see that though a juror may have served for one week, and been discharged, yet he is liable to be called again when it becomes necessary to resort to the original list to supply a deficit in the subsequent panel. To hold that one week's service at the same term would disqualify, might be to nullify entirely the latter clause of this eleventh section.

But again: in our opinion, there can be no question of the correctness of the ruling of the court in this instance, when we consider the plain import of the language used in the twenty-third section of the same act. That section provides that, "whenever a *special venire* shall be ordered, *the names of all the persons selected by the jury commissioners to do service for the term at which such venire is required* shall be placed upon tickets of similar size and color of paper, and the tickets be placed in a box, which shall be well shaken up; and from this box the clerk, in the presence of the judge, in open court, shall draw the number of names required for said *special venire*, and the names of the persons so drawn shall be attached to the writ of *special venire facias*, and the persons named shall be summoned by

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the sheriff," etc. Acts 1876, pp. 82, 83. To hold that one week's service at the same term would *ipso facto* disqualify a juror from further service at the same term, might operate a nullification entirely of this provision of the statute concerning special *venires*.

The case at bar was one requiring, and the juror proposed to be challenged belonged to, a special *venire*. Were there any doubt as to the meaning of the word "preceding," as used in the twenty-sixth section, we would feel not only authorized, but compelled, to give the construction we have placed upon it, in order to make it harmonize with other sections of the same act, not liable to doubtful interpretation.

As to the point made and presented in the second bill of exceptions, it is only necessary that we should refer to cases heretofore decided by this court where the identical question has been determined. When the attention of the court was called to the fact that defendant was not present in court at the time his notice for a new trial was considered and acted upon, the court promptly ordered that defendant be brought again into court, and then in his presence, setting aside the order overruling it, offered his counsel an opportunity to reargue the motion for a new trial, which was declined. As was said by Judge Dillon, in *The State v. Decklotts*, 19 Iowa, 447, "the error, if any, was cured by an offer of the court to permit defendant to file and argue his motion for a new trial anew, which he declined." *Gibson v. The State*, 3 Texas Ct. App. 437; *Krautz v. The State*, 4 Texas Ct. App. 534; *Sweat v. The State*, 4 Texas Ct. App. 617; *Berkley v. The State*, 4 Texas Ct. App. 122.

The charge of the court and the sufficiency of the evidence are both complained of in the motion for a new trial, and are also earnestly discussed in the printed brief filed here by the counsel appointed in the lower court to repre-

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sent the defendant. Counsel has performed his duty well; but this court cannot agree with his conclusions in regard to the supposed errors complained of.

The charge of the court, it is true, is very concise, but it presents, we believe, fully the law applicable to the facts of the case, and no additional instructions were asked for the defendant.

There is little, if any, conflict in the material portions of the evidence as exhibited in the record. So far as we can perceive, no murder was ever committed with less provocation, or under more heartless circumstances. The deceased, one Augustine Anallo, had cohabited for several years with a woman, by whom he had several children. Defendant induced the woman to quit deceased and live with him. He carried her and the children of deceased to Johnson's ranch, where he was engaged as a shepherd, and had been living with her two months prior to the homicide. Deceased went to the ranch to see his children, and applied to and obtained defendant's permission and consent to stay all night at his house with them. The woman testified that "she had no conversation with deceased on his visit to the ranch, on Thursday night, and that defendant stayed there, too; that she slept with defendant." The deceased remained at the ranch the next day, and told Johnson, who inquired about it, that he had seen defendant, and that they had settled their differences about the woman. Johnson then proposed to hire deceased for a few days to aid him in shearing sheep. This was on Friday evening. That night, deceased, defendant, Johnson, and the woman all ate supper together, defendant and deceased conversing and seeming friendly. After supper, defendant invited deceased to take a walk with him. They had not been absent long when defendant returned alone to the house. Johnson asked defendant where the other man was. "He replied that he

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had struck him (deceased) some blows with a club, and that he was out there." Johnson ordered some parties who were present to go with defendant and find deceased, and bring him to the house. These parties found deceased about 300 yards off, near the sheep-pens. He was dead, his skull having been crushed by a blow from an axe which was found lying near by, with blood upon the helve, or handle.

Defendant made no statement attempting to explain, justify, or excuse the act; but, when brought back to the house, told Johnson that he, "Johnson, might do what he pleased with him, — either shoot him or hang him."

We cannot see how the jury could reasonably have found a different verdict from the one here rendered against defendant. His trial has been a fair and legal one; and believing that justice, as well as the law, demands that the judgment of the lower court should be carried into execution, it only remains for this court to declare that the judgment is in all things affirmed.

Affirmed.

ANDREW BRADY v. THE STATE.

EVIDENCE. — It is the province of the jury to reconcile, if possible, any conflict in the evidence produced before them; and, if not possible, to give credence to the party they believe best entitled to it.

APPEAL from the County Court of Victoria. Tried below before the Hon. R. H. COLEMAN, County Judge.

The conviction was for aggravated assault and battery on a female.

No brief for the appellant has reached the reporters.

W. B. Dunham, Assistant Attorney-General, for the State.

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ECTOR, P. J. The defendant was convicted of an aggravated assault and battery, and fined \$100. The only error assigned is, that "the verdict of the jury is contrary to the law and the evidence."

The information and facts are sufficient to charge and convict the defendant of an aggravated assault and battery committed by him, an adult male, with his fist, upon one Fanny Holliday, a female. In one material point there was a conflict between the evidence given by the witness for the State and that of the witnesses for the defendant. It was the province of the jury to reconcile this conflict if they could, and, if they could not do this, to give credence to the party or parties who, in their opinion, were best entitled to it. They chose to believe the witness offered by the State, and to disregard the statements of defendant's witnesses. As the judge who tried the cause below, had the witnesses before him, and heard them testify, refused to set aside the verdict, we see no reason why this court should disturb it.

The judgment is affirmed.

Affirmed.

JAMES LINNEY v. THE STATE.

UNLAWFUL HERDING OF STOCK — INFORMATION. — In a prosecution by information, under the act of June 2, 1878, for the unlawful herding of stock upon the land of another, without the consent of the owner, and within one-half mile of the residence of any citizen of this State, it is essential that the information allege the number of hours the stock was so herded after notice to leave, as the penalty for the violation of the act is regulated by the number of hours the violation continued.

APPEAL from the County Court of Bee. Tried below before the Hon. W. R. HAYES, County Judge.

The opinion sufficiently states the case.

J. J. Swan, for the appellant.

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W. B. Dunham, Assistant Attorney-General, for the State.

WINKLER, J. The appellant and two others were prosecuted in the County Court, by information, for an alleged violation of the act of June 2, 1873, entitled "An act to prevent the herding of stock on certain lands therein named." The information charges, that "on the 20th day of May, A. D. 1878, within the limits of the county of Bee, Fulmore Linney, James Linney, and Joseph Curviel did unlawfully herd a drove of cattle, in number exceeding twenty-five head, within less than one-half mile of the private residence of L. P. H. Williams, after being duly notified to leave."

On the trial, the other defendants were acquitted, and this appellant was convicted and a fine imposed of \$50; after which a motion was made in arrest of judgment, on the ground, among others, that the complaint does not specify the number of hours the defendant remained on the land. The motion was by the court overruled, and notice of appeal was given. We are of opinion that the court erred in overruling the motion in arrest of judgment.

By section 1 of the act it is declared that, after the act should go into effect, it shall not be lawful for any person or persons to herd any drove of cattle or horses, numbering more than twenty-five head, upon any land in this State, not his own, situated within one-half mile of the residence of any citizen of this State, without the consent of the owner of said land.

By section 2 it is provided, "that whenever any person so unlawfully herding horses or cattle shall be requested by any resident of this State, residing within one-half mile of the place where such stock are being so unlawfully herded, to remove the same from such land, and shall fail, refuse, or neglect to remove such stock at once, he shall be deemed

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guilty of a misdemeanor, and, upon conviction before any court of competent jurisdiction, shall be fined in any sum not exceeding one hundred dollars for each hour of delay after notice given."

From this extract, it will be seen that the punishment to which one who violates the provisions of the act becomes liable, upon conviction, is regulated and is dependent upon the number of hours he shall delay in removing the stock after he shall have been requested by the resident being intruded upon to remove them.

This information should be given the accused by the indictment or information. The information in the present case is defective and insufficient, because it does not charge the number of hours the herd was permitted to remain after being requested to remove them. This is fatal to the conviction, and goes to the foundation of the prosecution. The judgment is reversed and the cause dismissed.

Reversed and dismissed.

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LOUIS ROBLES v. THE STATE.

1. CONTINUANCE. — Process for witnesses must be sued out in a reasonable time, and the application must disclose to whom and when delivered. Nothing is to be presumed in aid of an application for a continuance. In this case the application does not show due diligence to procure the testimony; is indefinite as to time; and fatally defective in not showing what became of the attachment after it was issued.
2. VENIRE — SERVICE. — Service of a copy of the names of persons summoned on a special *venire facias* may be had upon the defendant at any time after indictment, whether before or after arraignment; but he cannot, unless he waives the right, be brought to trial until he has had one day's service of the copy.
3. JURY — SPECIAL VENIRE. — The court has no power to excuse jurors summoned on a special *venire*, until they have appeared at the time and place designated in the *venire facias*. And in forming the jury in a capital case, the jurors must be called and tested in the order in which their names

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appear on the *venire facias*; and they cannot be excused for cause or exemption, or challenged, until their names are so called.

4. **SAME — CASE STATED.** — At the trial of a capital case, several persons summoned on the special *venire* failed to appear and answer to their names, and the court announced that they had been excused because, on the calling of a previous *venire* in another case, they had shown and claimed their exemption from jury-service, and had notified the court that they would claim it in this case. *Held*, not within the competency of the court to thus excuse them in advance.
5. **SAME — COMPETENCY.** — One who “rents a room, and boards,” is a competent juror, and is a householder within the meaning of the statute.
6. **HOMICIDE — CHARGE OF THE COURT.** — If, in a trial for murder, the facts proved raised a doubt whether the jury might find the homicide to be manslaughter or justifiable homicide, then the court should charge the law pertinent thereto, and give the jury an opportunity to pass upon the doubt.
7. **TRANSCRIPT — CLERICAL ERRORS.** — The indictment, as copied into the transcript, charges the offence to have been committed in the year “one thousand, eight thousand, eight hundred and seventy-four.” However manifest it may be that this mistake was made in transcribing the indictment, this court should reverse the judgment for this error alone, because the offence is charged to have been committed subsequent to the indictment.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

On November 8, 1878, the appellant was indicted for the murder of Anesto Moreno, on November 28, “one thousand, eight thousand, eight hundred and seventy-four” (as copied in the transcript), in Nueces County. He was put upon his trial on the 19th day of the same month, was convicted of murder in the second degree, and his punishment assessed at ten years in the penitentiary.

Mateo de la Hoya, for the State, testified that in November, 1874, he was keeping store at Preseños Rancho, in Nueces County, Texas. That, on the day of the killing, himself and deceased were standing in the store door when appellant rode up and accused deceased of having his (appellant's) horse. Deceased replied that the corporal, or

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man in charge of the horses, had loaned him the horse. Deceased had been drinking. After remaining at the store some time, deceased took appellant by the arm and took him out of the store. Deceased, while in the store, kept up a wrangling and quarrelling with appellant, telling him that he (appellant) was a man only at the Ranchos Santa Gertrudes and Butieras, while he (deceased) was a man everywhere. Deceased pushed a whip upon appellant's arm as he took him out. In a few minutes witness heard a shot, but, being very busy, did not go out. Soon afterwards, saw Maldonado take deceased, holding his arm, to his (Maldonado's) house. Witness then, seeing that deceased was wounded, sent a man to San Diego to notify the justice of the peace of the affair. Did nothing more, except furnish a box in which to bury the deceased after he died that night. Deceased was shot in the left side, and had a wound on the head as though struck by the hammer of a pistol. Witness saw no arms about the person of deceased during the day. When witness started the man to the justice, appellant remarked that the sending was unnecessary, as he was going to give himself up. Appellant had a pistol in his boot. Appellant was not present when deceased died, and witness does not know whether he was at San Diego at the time, or *en route*.

On cross-examination, witness said the horse in dispute belonged to Capt. King; that appellant was a corporal employed by Capt. King. Deceased told appellant that he borrowed the horse from a herdsman. Knows of no quarrel, other than this about the horse, between the parties. The deceased came to witness's store a short time before appellant; was very drunk. And witness also swears that deceased and appellant drank together at the store.

Francisco Patiño, for the State, testified that he was the clerk of the last witness, and was at the store when the killing occurred. Deceased on that day purchased goods and

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liquor at the store, and was there when appellant and one Gregorio Cruz came to the store. Appellant claimed a horse that deceased had, belonging to Capt. King. Witness does not know what reply deceased made to appellant, but saw deceased, appellant, and Cruz drinking together of the liquor purchased by deceased. Deceased then slipped his whip on his arm, laid his blanket on the counter, took appellant by one arm, and said, "If you are a man come outside." The two went outside, and shortly witness heard the shot. In five or six minutes, saw Maldonado taking deceased to his (Maldonado's) house. Deceased, when afterwards seen by witness, was wounded in the head and side. Deceased told witness he could not recover, and, though drunk when he was shot, knew what he was talking about. Told witness that he had nothing against accused. Witness saw no weapons on deceased that day. Appellant had a pistol stuck in his boot.

Anastacio Gomez testifies, for the State, that, when he got to the store, deceased and appellant were talking about a horse, — deceased very angry. Saw them quarrelling and drinking together, and afterwards saw them go out together, as described by other witnesses, and heard the firing. On cross-examination, says that he went to San Diego with appellant, when appellant went to give himself up to the justice of the peace.

Salome Maldonado, on the part of the prosecution, states that, in 1874, he lived in a house near and opposite the store where the shooting took place; that, a day or two before the occurrence, appellant came to his house and directed him (witness) to get a horse for him (appellant) that was running with a lot of mares belonging to the rancho, which horse was the property of Capt. King. On the day of the killing, witness had saddled a horse, to do as directed by appellant, and, whilst eating breakfast before starting out, witness heard a pistol-shot, and was then told

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there had been a "fuss" at the store. Witness then went to the back of the store and found deceased, who asked witness to take him (deceased) up, and carry him to witness's house, which witness did, leaving deceased there, and directing those about to allow no one to enter the house until witness returned. Witness then went to the store and told all persons there that if any of them had anything to do with the shooting, not to go about the wounded man. Appellant told the witness, then, that what he had done was on account of a horse deceased claimed, which belonged to Capt. King, and that deceased had forced the quarrel on him (appellant). Appellant was at the store door when witness carried deceased off as stated. Witness had no talk with appellant after that detailed. Deceased would not talk with witness about the shooting. Witness then went after the horse, and on returning found deceased so weak that witness could not understand what he would attempt to say. Saw witnesses Hoya and Patiño at his house after he returned from hunting the horse, but not before. Does not remember that deceased told the two witnesses spoken of who it was shot him. Deceased seemed to be out of his right mind, and could hardly be understood. Deceased had on a blanket when witness found him, but no arms. The State closed.

Defendant then introduced Antonia Medina, who testified that she had known appellant since he was a child. Did not know deceased, and knows nothing of the shooting. On the third day after the shooting, as she was passing home by the rear of the store-house where the shooting was said to have been done, she found a butcher-knife, with blade about nine inches long, and a black handle. Witness took the knife home, but has lost it long since. Does not know to whom it belonged. Did not see Ylario Galvan on that day, except at her house.

On cross-examination, witness says that she heard no

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shooting on the day the affair happened. She lives some distance from the store; does not know how far, and there are houses between her residence and the store. She took the knife home, but showed it to no one, and does not know to whom it belonged. There is a lane passing by the store, and it was a short ways from the path that she found the knife. It was not hidden by weeds, but lying in the dust. Had never seen the knife before.

Candelario Gonzales testified, for the defence, that he had known appellant for twelve years, and that appellant, at the time of the killing, was "corporal" for Capt. King. Had known deceased about two months before his death, and saw him last at the Preseños Rancho. Remembers when deceased died, but does not remember the date; thinks it was in November, 1874. Witness was employed by Capt. King, and was under appellant. Appellant took witness with him to the store on the day of the killing, to carry supplies back to the camp near the rancho. Deceased came up to the store, on a horse belonging to Capt. King, when appellant asked him where he had got that horse. Deceased would not answer satisfactorily, saying only that he had borrowed it from one of the men who had charge of the stable-horses. As appellant and deceased went into the store together, witness noticed that deceased had a knife with a black handle thrust into his belt. The blade was wrapped in a handkerchief or piece of cloth, and seemed about nine inches long. Witness then, having received the supplies, left the store and returned to camp.

On cross-examination, witness says appellant and himself went to the store on foot, and met the deceased at the door. Appellant first spoke, asking deceased about the horse, when deceased answered that it was none of appellant's business how the horse was obtained. Witness left appellant and deceased inside the store. When witness had crossed a creek, on his way to camp, he saw deceased and appellant

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come out of the store, deceased having hold of appellant's arm. Did not know where they were going. Witness judged of the size of the knife on deceased, which was worn on the right side, from its appearance and bulk. Appellant had charge of a party encamped near the rancho, hunting up Capt. King's horses, to which party witness belonged.

The opinion discloses the facts pertinent to the questions of practice.

Pat O' Docherty and *F. E. Macmanus*, for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was indicted at the October term, 1878, of the District Court of Nueces County, for the murder of one Anesto Moreno. He was tried at the same term of the court, convicted of murder in the second degree, and his punishment assessed at ten years' confinement in the State penitentiary. The case is now before this court on appeal, and the defendant has assigned the following errors, to wit:

"1. The court erred in refusing to grant the defendant a continuance in this case, on his affidavit and motion therefor.

"2. The court erred in excusing, on its own motion, persons drawn as jurors in this cause, whose names had been served upon the defendant in the copy of the *venire* from which the defendant was to select a jury.

"3. The court erred in this: that a *venire* of sixty persons, qualified jurors, was ordered by the court for the trial of the cause; that sixty jurors were drawn, and a copy of the *venire* thus drawn was served upon the defendant; that

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many persons on said *venire* were excused by the court, on account of disqualifications and exemptions known to the court, without requiring their personal attendance in court and their qualifications tested; and that by such action of the court the number of persons on the *venire* was reduced below the number required by law and the order of the court for said special *venire*, and the defendant was deprived of his right to have a *venire* of sixty legally qualified jurors tendered to him from which to select a jury.

“ 4. The court erred in its ruling as to the qualifications of George Godshall, and thereby deprived the defendant of the benefit of one of his peremptory challenges.

“ 5. The court erred in its rulings as to the formation of the jury in this cause, and thereby compelled the defendant to exhaust his peremptory challenges, and accept as a juror Leonard Webber, who was not an acceptable juror for the defendant.

“ 6. The court erred in requiring the defendant to pass upon the jury in this case before an arraignment was had in the cause, and in requiring the defendant, after he had accepted eleven jurors, to be arraigned and plead to the indictment, and to accept the jurors then selected, without tendering to the defendant a new *venire*.

“ 7. The court erred in its instructions to the jury, in that the court did not instruct the jury as to the law of *manslaughter* and of excusable homicide, the facts of the cause being of such a character as to authorize the jury in finding a verdict of manslaughter or in acquitting the defendant.

“ 8. The court erred in refusing a new trial in the case on the grounds set forth in the motion of defendant therefor.”

In his application for a continuance, the defendant says he cannot go to trial at this term of the court on account of the absence of the witness Ylario Galvan, who resides in

Duval County, Texas ; that he caused an attachment to be issued for the witness to Duval County ; that he expects to prove by the said witness Ylario Galvan that he (Galvan) was present on the day that the deceased, Anesto Moreno, met this defendant, being the same day that the said Moreno received the wound that caused his death ; that on the said day Moreno was armed with a knife, commonly called a "*belduque*," and that the same was in his belt at the time he met and addressed the defendant ; that this witness was present during the entire conversation which took place between the defendant and deceased, previous to his receiving the fatal wound ; that, on the day following the service of a copy of the *venire* in this cause upon him, he caused an attachment to be issued to Duval County. The witness is not absent by the procurement or consent of this defendant, and this application is not made for delay.

The court below properly overruled defendant's application for a continuance. It does not state when defendant was served with a copy of the *venire*. The indictment was filed on November 8, 1878, and the defendant was arraigned on the 19th day of the same month. Our Code of Criminal Procedure provides, that "no defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special *venire facias*, except when he waives the right. But the service may be made at any time after indictment found, whether before or after arraignment." Pasc. Dig., art. 3022. The application does not show due diligence to procure the testimony of the absent witness, and is altogether too indefinite as to time. It is further fatally defective in not stating what became of the attachment after it was issued. Process for witnesses must be sued out in a reasonable time, and the application disclose to whom and where delivered. Nothing is to be presumed, in aid of an

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application for a continuance. *Bowen v. The State*, 3 Texas Ct. App. 617; *Murray v. The State*, 1 Texas Ct. App. 417; *Townsend v. The State*, 41 Texas, 134.

We will consider the second and third errors assigned, together.

It appears from a bill of exceptions taken in the cause, that, on calling the special *venire* drawn herein (a copy of the persons' names had been served upon the defendant), several persons whose names appeared on said *venire* did not answer to their names, and, the attention of the court having been called to this fact, the court stated that it had excused several of said absentees, on various grounds. The defendant objected to this action of the court in excusing thus, of its own motion, any one who had been summoned on the special *venire* in this case, without such parties appearing and being examined as to their qualifications; which objection was overruled by the court, and to which ruling the defendant excepted, and tendered a bill of exceptions, which is bill of exceptions No. 2. "And it further appearing that the following named persons upon said *venire* did not answer to their names, when called in their regular order, in proceeding to organize the jury to try this case, viz., Julius Henry, George F. Evers, and E. Morris, the court also stated that, of its own motion, it had excused said last-mentioned jurors, on the ground that they belong to a fire company of the city of Corpus Christi, and were exempt from jury-service; to which ruling of the court defendant excepted, and tendered a bill of exceptions," which bill of exceptions is No. 4. These bills of exceptions were allowed and approved by the court, with the following explanations, to wit: "In the second section of said bill, the parties excused had appeared before the court on other special *venires*, and had urged their respective exemptions from all jury-service, which were allowed by the court; and the said persons then informed the court that they would claim

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their respective exemptions in every case in which they were called upon to serve, and then asked the court if they would be required to appear on the two next special *venires*, when they were informed by the court that they would each be excused from attendance, as the court had no authority to compel them to serve.” * * * And section 4 of said bill of exceptions is also explained as follows, to wit: “The parties named in section 4 had appeared and claimed their exemption, and had been excused under the same circumstances as were those jurors in section 2 above; and said jurors having been informed by the court that they need not appear any more during said court, the list of firemen exempted by law having been filed with the clerk of the District Court, May 19, 1877, and the persons mentioned in section 4 appearing in said list of firemen exempted by law from jury-service.”

We think the court erred in thus excusing any of said *venire* from attendance, and in informing them that they would be excused. After the attendance of the jurors at the time and place designated in the *venire facias*, the court could discharge or excuse one or more of them for cause, or because they were exempt from jury-service and claimed such exemption; but it had no authority before that time to excuse their attendance, as was done in this case. The manner of testing the qualifications of the persons on said special *venire*, as jurors, is plainly prescribed by the statute. The court is the judge, after a proper examination, of the qualification of a juror, or as to whether or not he should be excused for cause, or because he was exempt from jury-service. In forming a jury in a capital case, the names of the persons summoned should be called in the order they stand upon the list, and, if present, they should be tested as to their qualifications; and unless they are excused for cause, or unless exempt from jury-service, and claim such exemption, or unless peremptorily challenged, should be empan-

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elled on the jury. The court has no more power or legal authority to excuse any one of the special *venire* before his name is called regularly, at the proper time, in open court, to test his qualifications as a juror in the cause, than it has to decide, in advance, any other legal question when the parties are not before the court, or the case called for trial.

The next error assigned is not well taken. The juror Godshall, who is referred to in this assignment, when he was examined touching his qualifications as a juror, stated that he rented a room and boarded. The object of the question to which the answer was made being to ascertain whether he was a freeholder or householder, his answers show that he was a competent juror.

What we have already said disposes of the fifth error assigned.

The record does not sustain the next assignment in regular order. From the recitals in the judgment, it appears that in this case, on November 19, 1878, "the defendant was arraigned in open court, the indictment read by the clerk, charging the said defenaant with the crime of murder, and he was then asked how he pleaded to said charge, guilty or not guilty; to which he pleaded not guilty, when the case was called for trial." The judgment further recites that, after the jury were duly tried, empanelled, and sworn in said cause, the indictment was again read to him, charging the defendant with the crime of murder, to which he pleaded not guilty.

The court is required by law, in every case of felony, whether asked or not, to deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case. Pasc. Dig., art. 3059. In this case, the court instructed the jury as to the definition of murder in the first and second degrees, but failed to instruct them as to any of the lower grades of culpable homicide, or as to

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the law of homicide in self-defence. The question, then, is, Was there any evidence before the jury which required a charge upon the law of manslaughter or justifiable homicide?

If the facts proved create a doubt that the homicide might be a case of manslaughter or of justifiable homicide, then the court, in its charge to the jury, should have given them an opportunity to pass upon that doubt. In a doubtful case, the court must not solve that doubt resting on the facts; for, if it does, and this court affirm the judgment of the lower court, that court and this will decide doubtful facts, and the right of trial by jury will be practically gone. *Halbert v. The State*, 3 Texas Ct. App. 661; *Sutton v. The State*, 2 Texas Ct. App. 344; *Marshall v. The State*, 40 Texas, 200.

So far as appears from the record, there was no person who saw the defendant and the deceased at the time the fatal shot was fired. Under the testimony in the case, we believe that the court below should have charged the jury on the law of manslaughter and of justifiable homicide. For the several errors pointed out in this opinion, the judgment must be reversed.

There is another question which we cannot pass in silence. The indictment, as copied in the transcript, charges that the offence was committed "on the twenty-eighth day of November, in the year of our Lord one thousand, eight thousand, eight hundred and seventy-four." However manifest it may appear that the date of the commission of the offence, as charged in the indictment is a clerical mistake committed in the preparation of the transcript, this court will reverse the judgment when the transcript shows that the offence is charged to have been committed subsequent to the indictment. It is better that the judgment should be reversed, than to establish such a

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precedent, or encourage carelessness in the preparation of so important a part of the record to be brought to this court as the indictment.

The judgment of the District Court is reversed, and cause remanded.

Reversed and remanded.

LUIS RICHARTE v. THE STATE.

1. CHARGE OF THE COURT — FILE-MARK. — Unless the transcript shows that the charge to the jury in a felony case has been filed, the paper will be treated as unauthenticated, and the conviction accordingly be set aside. The charge should be filed by the clerk as soon as read, and before it is given in hand to the jury.
2. EXPRESS MALICE, which is the essential constituent of murder of the first degree, is never inferred or implied alone from the act done, or the means used in doing it; it must be proved *aliunde*, like any other fact in the case, by such evidence as may be reasonably sufficient to satisfy and convince the jury of its existence.

APPEAL from the District Court of Cameron. Tried below before the Hon. J. C. RUSSELL.

The conviction was for murder, in Cameron County, and the death penalty was assessed.

The State proved by the witness Moreno, brother of the deceased, that witness and deceased left Brownsville on the day of the killing, travelling the Corpus Christi Road, and that, after riding some six or eight miles, the attention of witness, who was in advance of deceased, was attracted by the struggling of a horse. Witness, on looking back, discovered accused pulling deceased off of the ass he was riding, and after getting deceased off, saw the accused shoot deceased in the head with a pistol. Witness, having ridden up, was compelled by accused to take deceased's pistol from the body and deliver it to accused, after which the accused

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rode off. Witness then returned to Brownsville and reported the killing to the coroner, describing the murderer as a man wearing a black coat, somewhat faded, a lead-colored hat, and riding a bay horse. Witness buried his brother the day following, and, three days later, started again on the same road. At Bendito Rancho, forty-one miles distant, witness again saw the accused, saluted him, and, in the presence of Juan Garcia and Pabla Reyes, remarked to accused, "You travel fast,— you left Brownsville Monday;" to which the accused replied, "No, I left Wednesday." Witness then charged accused with the murder, to which the accused answered, "What, only one man?" Witness then asked if he intended to kill others. Accused answered, in reply, that "the future will show." Accused then rode off rapidly, dragging his rope. Witness asked Garcia to assist him in arresting the accused, but the request was refused. Garcia then told witness that the name of accused was Luis, and that he was the son of Juliana, the *tamalera* of Brownsville.

Witness then rode to the nearest telegraph office, and despatched to the coroner the description and name of accused. The arrest of accused followed shortly. Witness identified the accused as the murderer, picking him out of a number confined in jail. Had known him four years by sight, but not by name.

The account of the interview at the Bendito Rancho was corroborated by Garcia and Reyes. The justice of the peace who held the coroner's inquest testified that death was caused by a gun-shot wound, and that from Moreno's description of the murderer he supposed him to be the accused, and that on receipt of the telegram from Moreno he issued a warrant for the arrest. Had also, on the morning of the killing, issued a warrant for the arrest of accused for disturbing the peace on the day before.

By the witnesses C. Richarte, F. Ramirez, J. Ramirez,

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and Gutierrez, the first the sister, and the others friends of the accused, he proved that during the whole of the day of the killing he lay in a back room of his mother's house, concealed, avoiding service of the writ for the misdemeanor of the day before. Zuniga, a custom-house officer, who was posted in the house of accused's mother, watching a house opposite, in which smuggling was supposed to be carried on, swore to the presence there of the accused on the day of the killing. Trevino, also a custom-house officer, saw the last witness at the house of accused. The mother of the accused swore to the presence in the house of accused during the day of the murder. The constable swore that he had a warrant for the arrest of accused. Other witnesses swore that accused owned a sore-backed black horse, but had never owned a bay horse, and that he wore a lead-colored hat.

The State, in rebuttal, proved by witnesses Barthelow and Puga that they met the accused on the 24th, three days after the killing, about forty miles from Brownsville, on the Corpus Christi Road, riding a white-faced bay horse.

F. E. Macmanus, for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

WHITE, J. In this case, the appellant was indicted for the murder of one Refugio Moreno, and was found guilty of murder in the first degree.

There is a paper copied into the record as the charge to the jury, but it seems never to have been filed. It has been repeatedly decided that no paper not bearing the file-marks of the clerk will or can be considered as part of the record on appeal; and the rule with regard to the charge of the court is that, "when the court has charged the jury, the

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charge should be handed to the clerk, who, before handing it to the jury, should put his file-mark upon it; and the transcript, on appeal, should show the file-marks on the charge and on all other file-papers in the case." *Krebs v. The State*, 3 Texas Ct. App. 348; *Haynie v. The State*, 3 Texas Ct. App. 223; *Parchman v. The State*, 3 Texas Ct. App. 225; *Clampitt v. The State*, 3 Texas Ct. App. 638; *Thompson v. The State*, 4 Texas Ct. App. 44; *Long v. The State*, 4 Texas Ct. App. 81; *Hunt v. The State*, 4 Texas Ct. App. 53; *Dishong v. The State*, 4 Texas Ct. App. 158; *Doyle v. The State*, 4 Texas Ct. App. 253; *Hill v. The State*, 4 Texas Ct. App. 559.

Since the charge cannot be considered, because it never has been filed, it follows that the case must be reversed for want of a charge, the statute requiring that, in all felony cases, "the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case." Pasc. Dig., art. 3059.

But, had the paper purporting to be the charge in this case been properly authenticated, we should have been compelled to have reversed the case for error of law therein committed. We notice this error, lest it should be fallen into again on a second trial if we failed to point it out and call the attention of the court specially to it.

In the third paragraph of the charge, the following language is used, viz.: "If one take the life of another, without cause or excuse, with an instrument likely to produce death, it is of express malice, premeditated and deliberate killing, and is murder in the first degree." This is error, as has been repeatedly held by the Supreme Court and by this court. "While the law implies malice on proof of voluntary homicide, it does not impute express malice." *Farrer v. The State*, 42 Texas, 272. "Express malice, which is the essential constituent of murder of the first degree, is never inferred or implied alone from the act done

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or the means used in doing it; it must be proved *aliunde*, like any other fact in the case, by such evidence as might be reasonably sufficient to satisfy and convince the jury of its existence." *Murray v. The State*, 1 Texas Ct. App. 417; *O'Connell v. The State*, 18 Texas, 344; *Plasters v. The State*, 1 Texas Ct. App. 673; *Primus v. The State*, 2 Texas Ct. App. 376; *Jones v. The State*, 3 Texas Ct. App. 150; *Halbert v. The State*, 3 Texas Ct. App. 659; *McCoy v. The State*, 25 Texas, 42.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Reversed and remanded.

CAROLINE RANCH v. THE STATE.

1. **AGGRAVATED ASSAULT—INDICTMENT.**—To the general rule that the indictment must set out the name of the person assaulted, there is but one exception, and that is when the name is to the grand jurors unknown; which fact must be averred.
2. **PRACTICE.**—The indictment charges the assault to have been made upon "the wife of T. B.," but does not aver that the name is unknown. On a motion in arrest of judgment, the defendant objected that the indictment is fatally defective because it does not set out the name of the person assaulted. It is urged by the State that this defect is cured by the verdict, and should have been raised by a motion to quash. *Held*, that the defect is not only formal, but substantial, and may be taken advantage of by motion in arrest of judgment. "A motion in arrest of judgment shall be granted upon any ground which would be a good exception to an indictment or information, for any substantial defect therein."

APPEAL from the County Court of DeWitt. Tried below before the Hon. O. L. THRELKILL, County Judge.

The indictment fails to set out the name of the party assaulted, beyond charging that she was the wife of Thaddeus Bunker, and does not aver that her name is to the grand jurors unknown.

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W. R. Friend, for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was charged by indictment, tried, and convicted of an aggravated assault. A motion was made in arrest of judgment, which was overruled, and this appeal is prosecuted.

One ground of the motion in arrest of judgment is set out as follows: "The name of the party injured is not set forth or contained in the indictment." The ruling of the court on the motion is assigned as error. The indictment charges that the accused, stating time and place, "did then and there, with force and arms, commit an assault upon the body of the wife of Thaddeus Bunker;" and, after averring circumstances of aggravation, the indictment states, "did then and there strike and wound the said wife of said Bunker with a large piece of wood, being then and there a deadly weapon; against," etc.

The general rule is, that in indictments or informations for offences of this character the name of the person upon whom the assault is charged must be stated in the indictment or information.

"The indictment must state the facts of the crime with as much certainty as the nature of the case will admit." 1 Bishop's Cr. Proc., sec. 494, and authorities referred to in note 5. The offence must be set forth in plain and intelligible words. Code Cr. Proc., art. 395, clause 7; art. 403, clause 7 (Pasc. Dig., arts. 2863, 2870).

To this general rule we know of but one exception, and that is where the name of the injured party is unknown. In such case it is sufficient to state that fact.

There is nothing in the record before us to show that the name of the assaulted party was not known to the grand

Syllabus.

jurors, nor does the indictment state that her name is unknown to them. It does not appear that there was any reason or excuse given for failing to state plainly the name of the person upon whom the assault is charged to have been committed. The omission to so charge would have been cured if it had been averred in the indictment that her name was to the grand jurors unknown, if such had been the fact. *The State v. Snow*, 41 Texas, 596.

It is urged on behalf of the State, that the defect in the indictment is such as is cured by the verdict, and should have been raised on motion to quash. We are of opinion, upon an examination of authorities cited, that they do not support the position to the extent claimed. The defect in the indictment, we are of opinion, is not merely a formal, but a substantial one, which may be taken advantage of by motion in arrest of judgment. The Code provides: "A motion in arrest of judgment shall be granted upon any ground which would be good upon exception to an indictment or information, for any substantial defect therein." Code Cr. Proc., art. 678 (Pasc. Dig., art. 3143).

Because of a substantial defect in the indictment, of which advantage was taken in the proper manner and in due time, the judgment is reversed and this prosecution is dismissed.

Reversed and dismissed.

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JAMES SUMMERS v. THE STATE.

1. **EVIDENCE—PRACTICE.**—Objections to evidence will not be sustained when no reason was assigned therefor, and the evidence tended to prove any fact in issue.
2. **SAME—MEDICAL TESTIMONY.**—A surgeon or physician may be compelled to testify as to the result of a *post-mortem* examination made by him. He could not, however, be compelled to make such an examination.
3. **SAME—CASE STATED.**—In a murder case, the State examined a physician, who declined to state the cause of the death of the deceased because his

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knowledge thereof was acquired solely by his uncompensated *post-mortem* examination of the deceased; and thereupon the State proved by an unprofessional witness certain fractures of the skull of the deceased, disclosed by the *post-mortem* examination. The accused did not make the physician his own witness, and the other evidence suffices to show the cause of the death. *Held*, no error to the prejudice of the accused. The unprofessional witness was competent to state what he saw at the *post-mortem* examination; and, if the defence desired the undisclosed knowledge of the physician, they should have made him their own witness, and have asked the court to enforce its disclosure.

4. **EXPRESS MALICE.** — This element of murder in the first degree was not correctly expounded by an instruction that "express malice is where one, with a deliberate intent, kills another with an instrument likely to produce death." But, the conviction being only for murder in the second degree, the inadequacy of this definition is not material error; nor was it to the prejudice of the accused when implied malice was properly explained to the jury.
5. **SAME.** — A homicide committed with a deadly weapon is not with express malice unless accompanied with the other ingredients of murder in the first degree, — to wit, a cool and sedate mind, and a formed design to kill, or to inflict serious bodily injury likely to result in death, without lawful authority, justification, mitigation, or excuse.
6. **MURDER — INTENT.** — Under the Penal Code of this State, as under the common law, the intent necessary to constitute murder need not be an intent to take the life of the party slain. It may be an intent to do him serious bodily harm.
7. **CHARGE OF THE COURT.** — Doubts as to the propriety of giving a requested instruction should be solved in favor of the accused.
8. **VERDICT — PRACTICE.** — The presence of the accused, but not that of his counsel, is necessary when the verdict in a felony case is read.
9. **SAME — CASE STATED.** — The jury returned a verdict of conviction for murder in the second degree, and assessing the punishment at the penitentiary for life; whereupon the court referred the jury to their instruction that the legal punishment for that offence is the penitentiary for a term of years. The jury then amended their verdict by erasure and interlineation, so as to assess the penalty at the penitentiary for ninety-nine years. *Held*, correct practice, and not to the prejudice of the accused.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The indictment charged the appellant with the murder of

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a Mexican named Benito Martinez, in the county of Nueces, on September 2, 1878.

The appellant and the deceased, it appears, were both in the employment of Capt. Kennedy, and the fatal blow was inflicted in his pasture. The facts relative to the questions of practice are disclosed in the opinion of the court, and indicated in the head-notes.

Henry Jones, for the State, testified that, on the morning of the killing, appellant and deceased were talking very hurriedly in the Spanish language, which witness does not speak or understand. This hurried talk continued for some fifteen minutes. Witness then saw appellant coming from one side of the camp with a stick in his hand, but does not know where he got the stick, but knows he didn't have it when he left camp. Doesn't know how far he went after it. Deceased was on the other side of camp from appellant. Witness saw appellant strike deceased with the stick while deceased was kneeling, striking matches. There was a butcher-knife lying on the ground, some six feet from the deceased, when he was struck. Witness helped carry the Mexican into the camp, and poured water on his head, but did not bring him back to consciousness. Did not speak to appellant, and did not know of a fight until the blow was struck. Deceased always carried a knife. All of this occurred in Kennedy's pasture, in Nueces County.

The witness Roberts testified that the blow was struck while the deceased was in a stooping posture, striking matches to make a fire.

Dr. Spohn, for the State, testified that he was called in to see the deceased, but refused to state the cause of his death, as what he knows of it he got by means of a *post-mortem* examination and his professional skill and deductions of experience, which witness considers his own prop-

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erty, and for which the county of Nueces persistently refuses to pay.

Charles Benson, for the State, testified that he was on the coroner's jury at the inquest over the body of the deceased. Saw two fractures of the skull, through which the brain could be seen, when the *post-mortem* examination was made by Dr. Spohn.

McCampbell & Givens, for the appellant. The indictment alleges that the assault was made with a certain large stick. There is no allegation that the stick was a deadly weapon, nor was there any proof offered to show that the means used in the assault would ordinarily have produced death.

On the part of the appellant, we submit that it was not established by legal evidence that the death of Martinez was caused by the blow of the stick.

Dr. Spohn, a witness for the State, in his testimony, says: "He was a medical practitioner. On the 2d of September, 1878, was called upon to go and see Benito Martinez, then lying at a camp near Kennedy's pasture; found the deceased breathing, but unconscious; had a contusion on the left side of the head, but no exterior evidence of fractured skull; removed the patient to town, and attended him until the next day, when he died; after death, made a *post-mortem* examination, but I decline to state the cause of the man's death, as my knowledge was obtained by professional skill and from deductions of experience, which is my own property, and which the county of Nueces has persistently refused to pay for. I have no knowledge of the actual cause of the man's death, save through the *post-mortem* examination alluded to."

The court sustained the objection of the said Dr. Spohn in refusing to disclose the knowledge acquired in the said ex-

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amination, on the ground that he, said Spohn, not being paid therefor, could not be compelled to testify as to the same.

And afterwards the State attempted to prove by Benson, who was not an expert, and knew nothing of the science of surgery or anatomy, that the blow caused the death of the deceased, over the objections of the defendant. The court below, in giving this bill of exceptions, appends the following :

“ The above bill of exceptions is allowed and approved, with the following explanation and correction : Said Benson having served on the coroner’s inquest, and also being present when the *post-mortem* examination was made by Dr. Spohn on the body of the deceased, he was permitted to testify as to such facts, and as to what he had seen during said *post-mortem*, to wit, that during said *post-mortem*, Dr. Spohn called his attention to a fracture in the skull of deceased, which he saw, and also clots of congealed blood upon the brain of said deceased, where the brain was exposed ; but said Benson did not testify as to his opinion, but only to the above facts.”

We respectfully submit that the ruling of the court was erroneous, because the facts disclosed that there was better evidence than Benson as to what was the cause of the death of the deceased. It was a violation of what Prof. Greenleaf calls the fourth rule in the production of evidence, — that which requires *the best evidence of which* the case, in its nature, is susceptible. This author says : “ This rule becomes essential to the pure administration of justice.” 1 Greenl. on Ev., sec. 82.

Roscoe, in his Criminal Evidence, on the first page, says : “ It is the first and most signal rule of evidence, that the best evidence of which the case is capable shall be given ; for, if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it.”

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The facts of this case show that the testimony of Benson and Spohn disclosed that there was better evidence than that of Benson as to the effect of the blow on the head of Martinez, to wit, the evidence of the *post-mortem* examination.

If the court committed an error in sustaining the objection of Dr. Spohn in refusing to disclose the result of that examination, the conviction is illegal, and should be set aside.

The authority of the court to compel a medical expert to give testimony in matters relating to his profession, we believe, has never been before the Supreme Court or Court of Appeals of this State.

We do not think that a medical expert could be compelled to make a *post-mortem* examination without adequate compensation being tendered; but, the examination having already been made, it was a fact to which the court could compel the witness to testify.

We rely on the ground that Summers did not intend to kill Martinez. As there was no allegation that the stick was a deadly weapon, we are authorized to presume that it was not. As the State did not offer to prove that death would ordinarily have resulted from the means used, the presumption is that the State could not have proved it.

“The intention to commit an offence is presumed whenever the means used are such as would ordinarily have resulted in the commission of the forbidden act.” Pasc. Dig., art. 1654.

We think the failure of the prosecution to make this allegation and proof is sufficient to set aside the conviction.

In the statement of facts, the witness Henry Jones says he “saw Summers come from the other side of the camp with a stick.” No description of the stick is given.

There is no direct evidence that the accused struck the deceased with the stick. The witness Jones says, “De-

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ceased was struck on the head; he fell." He also states that there was a butcher-knife lying five or six feet from the deceased. He also states that the deceased always carried a knife.

We think this evidence is not sufficient to sustain a conviction of murder.

But suppose the accused did strike the deceased with a stick, there is no evidence as to its size, — certainly none as to its being a deadly weapon. Then we may presume, at most, that he intended to commit a misdemeanor. In such case, the following should have been given as the law:

"If one intending to commit a misdemeanor, and in the act of preparing for or executing the same, shall, through mistake or accident, commit an offence which is by law a felony, he shall receive the lowest punishment affixed by law to the felony actually committed." Pasc. Dig., art. 1653. And, under this view of the case, it was the duty of the court to give all the law applicable in a felony case, whether asked for by the defendant or not.

The defendant did ask for instructions on the question of negligent homicide, which, we think, ought to have been given. This instruction was based on article 2248, Paschal's Digest, which is as follows:

"When the unlawful act attempted is one known as a misdemeanor, the punishment of negligent homicide, committed in the execution of such unlawful act, shall be imprisonment in the county jail not exceeding three years, or by fine not exceeding three thousand dollars."

We contend that the court erred in refusing the other instructions asked by the defendant.

We think these instructions were particularly applicable, for the reason that the alleged blow was not given with an instrument which would ordinarily have produced death.

The third instruction asked by the defendant was to the effect that, before the accused could be convicted of any

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crime under the indictment, the State must prove that the alleged blow was the cause of the death of the accused.

We contend that Benson was not a competent witness as to the result of the *post-mortem* examination made by Dr. Spohn, as shown by the bill of exceptions. Benson was not an expert, and knew nothing of the science of surgery or anatomy. The qualification given to the bill of exceptions by the learned judge who tried the cause shows that Benson's statement was hearsay. Giving the testimony of a witness before the coroner's jury, the fact that during the *post-mortem* examination Benson saw a fracture in the skull, or "lumps of blood on the brain," does not amount to proof that the death was caused by an injury to the brain. The fracture of the skull may have been made during the examination. The lumps of blood may have fallen on the brain in the same way. There was no other evidence of the cause of the death of the deceased. The evidence of Benson shows that there was better evidence in existence, to wit, that of Dr. Spohn, who made the examination.

In the language used by this court in the case of *Barnell v. The State*, decided at Tyler, November 23, 1878 (reported in *Texas Law Journal*, December 4, p. 245), "the evidence adduced indicates that there was better, at least more conclusive, evidence within the reach of the prosecution. * * * When the testimony discloses the existence of better evidence,—*i. e.*, more original sources of information,—the law requires its production." See also *Porter v. The State*, 1 Texas Ct. App. 394.

Dr. Spohn says: "From the external examination of the said wound, which did not show any great violence, he could not say that the death resulted from the wound. As shown externally, it was not necessarily mortal."

He also stated that he made a *post-mortem* examination of the body, "and that from that examination he did know what was the cause of the death of the deceased."

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We further submit that there was grave error in the seventh paragraph of the charge given by the court to the jury, which is: "If you believe from the evidence that the defendant killed Benito Martinez, in Nueces County, with malice, express or implied, with an instrument likely to produce death, as charged in the indictment, you will find him guilty as charged, and the degree of the offence."

There was no allegation in the indictment that the instrument was deadly, or likely to produce death, nor was there any testimony offered that the instrument was likely to produce death.

"If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears." Pasc. Dig., art. 2272.

"If the weapon with which a homicide was committed were not of the character called deadly,—that is, likely to produce death, or great bodily injury,—the homicide would not be murder, although committed without legal provocation." *The State v. Jarrett*, 1 Ired. 72.

"Where no more is stated than that several blows were struck with a stick of curled hickory, with the larger end thereof, without stating more of the nature of the blows than that one of them was mortal, the facts are not so set forth as to leave the question of cruelty as one for legal inference." *The State v. Jarrett*, 1 Ired. 72.

We now come to the consideration of the objection contained in the defendant's second bill of exceptions.

The paper purporting to be the verdict was handed to the clerk, and read. It appeared therefrom that the jury had found the defendant guilty of murder in the second degree, and assessed his punishment at confinement in the penitentiary for "the term of his natural life;" whereupon the court referred the verdict back to the jury, and referred them to the charge, so as to show that the punishment would

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be for a term of years. The same paper was then altered by erasing the words "of his natural life," and interlining the words "ninety-nine years." This change was made during the absence of all of the defendant's counsel, and without the consent of the accused, and without his counsel being called. The jury were, however, polled by the court, on its own motion, and each severally declared that the verdict as amended was his verdict.

We think this action of the court, in permitting the verdict to be amended without the consent of the accused, and in the absence of his counsel, was erroneous, and should not be considered as a mere immaterial irregularity. The verdict as originally handed in by the jury was a nullity, and could not have been the basis of a valid judgment, for the reason that the law does not authorize confinement for life as a punishment for murder in the second degree.

It is admitted that when a verdict is informal, the attention of the jury may be called to it, and with their consent the verdict may be reduced to proper form; but this was not such a verdict. Any verbal charge, or even explanation or direction, especially in the absence of the counsel of the accused, we submit, is in violation of articles 3079 and 3082, Paschal's Digest.

Believing the accused has not been legally convicted, we ask a reversal of the case.

W. B. Dunham, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was indicted in the District Court of Nueces County, for the murder of Benito Martinez, on September 2, 1878. He was tried at the same term of the court, convicted of murder in the second degree, and his punishment assessed at ninety-nine years' confinement in the State penitentiary. The indictment alleges that the murder

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was committed with a certain large stick. There is no assignment of errors.

It is insisted, on the part of the defendant, that it was not established by legal evidence that the death of Martinez was caused by the blow of the stick. At the time of the fatal blow, the defendant and the deceased were in the employ of one Kennedy, and were encamped in his pasture. The defendant and the deceased had an altercation early in the morning, and the defendant was seen leaving the tent with an axe in his hand, some half an hour before the fatal blow was stricken, and the axe was taken away from him by the witness Roberts, "because he was afraid of trouble."

The witness Henry Jones testified "that James Summers and deceased, early in the morning, were talking very hurriedly; in not more than fifteen minutes, he saw Summers come from the other side of camp with a stick; don't know where he got the stick; he didn't come to camp with the stick; don't know how far he went after it. The Mexican was on one side of camp, and Summers on the other. Jim was the man struck deceased Mexican. Deceased was struck on the head; he fell. He was kneeling, lighting matches, with a butcher-knife lying five or six feet from his side. I helped to carry him in camp; poured water on his head. * * * Deceased always carried a knife. Didn't know anything about there being a fight until blow was struck."

The testimony further shows that Martinez, shortly after receiving the blow, became unconscious, and Dr. Arthur E. Spohn was sent by Mr. Kennedy to see Martinez. Dr. Spohn, a witness for the State, in his testimony, says: "He was a medical practitioner. On the second of September, 1878, was called upon to go and see Benito Martinez, then lying at a camp near Kennedy's pasture; found the deceased breathing, but unconscious; had a contusion upon the left side of the head, but no exterior evidence of fractured

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skull ; removed the patient to town, and attended him until the next day, when he died ; after death, made a *post-mortem* examination, but I decline to state the cause of the man's death, as my knowledge was obtained by professional skill and from the deductions of experience, which I consider my own property, and which the county of Nueces has persistently refused to pay for. I have no knowledge of the actual cause of the man's death save through the *post-mortem examination* alluded to." The court sustained the objection of Dr. Spohn in refusing to disclose the knowledge acquired in said examination, on the ground that he, not being paid, could not be compelled to testify as to the same.

Afterwards the State placed the witness Charles Benson on the stand, who testified "that he was on the coroner's jury that held the inquest upon the body of Benito Martinez ; was present when Dr. Spohn made, before the coroner's jury, a *post-mortem* examination ; saw two fractures of the skull of the deceased, on the left side of the head ; could see them plainly ; also saw the brains were in a low condition. They had lumps of blood among them." The testimony of Benson was admitted, over the objections of the defendant, and he took a bill of exceptions, which, after reciting the facts in regard to the refusal of Dr. Spohn to testify, and the rulings of the court thereupon, says : "And afterwards the State attempted to prove by Benson, who was not an expert, and knew nothing of the science of surgery or anatomy, that the blow caused the death of the deceased, over the objections of the defendant ; to which ruling of the court the defendant by his counsel excepts, and tenders this his bill of exceptions, that the same may be signed and made a part of the record."

The court, before signing, added the following explanation : "The above bill of exceptions is allowed and approved, with the following explanation and correction : Said Benson having served on the coroner's inquest, and also

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being present when the *post-mortem* examination was made by Dr. Spohn on the body of said deceased, he was permitted to testify as to such facts as he had learned, and as to what he had seen during said *post-mortem examination*, to wit, that during said *post-mortem examination* Dr. Spohn called his attention to a fracture in the skull of deceased, which he saw, and also clots of congealed blood upon the brain of said deceased, where the brain was exposed; but said Benson did not testify as to his opinion, but only to the above facts." It is submitted on the part of the defendant that the ruling of the court was erroneous, because the facts disclosed that there was better evidence than Benson's as to what was the cause of the death of the deceased, and that it is essential to the pure administration of justice that the rule should be enforced which requires the best evidence of which the case, in its nature, is susceptible. When the testimony of Benson was offered, there was no objection of this kind made to it. Exceptions to the admission of evidence on the trial, when no reason is assigned for objecting to it, will not be sustained when the evidence is obviously competent as tending to prove any of the facts put in issue by the pleadings.

The court may compel a physician to testify as to the result of a *post-mortem* examination; and it is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty should refuse to testify in a cause pending before the courts of his country, involving the life or liberty of a fellow-being and the rightful administration of the laws of a common country. Dr. Spohn has doubtless been misled, in taking the position he did, by the misconceptions of certain writers on medical jurisprudence. The question has been recently before the Supreme Court of Alabama, in the case of *Ex parte Dement*, and, after a thorough examination of the American and English cases bearing on the question, the court held

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that the law allows no excuse for withholding evidence which is relevant to the matters in question before its tribunal; that the administration of justice being a source of mutual benefit to all the members of a community, each is under obligation to aid in furthering it, as a matter of public duty; and the same principle which justifies the bringing of the mechanic from the workshop, the merchant from his store-house, the broker from his 'change, or the lawyer from his engagements to testify in regard to some matter which he has learned in the exercise of his art or profession authorizes the summoning of a physician, or surgeon, or skilled apothecary to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal; and that no court would be excusable in exonerating them from giving such evidence without pay, on the ground that it would be a professional opinion. *Ex parte Dement*, 53 Ala. 389. A medical expert could not be compelled to make a *post-mortem* examination unless paid for it; but, an examination having already been made by him, he could be compelled to disclose the result of that examination.

The appellant in this case, however, cannot be heard to complain of the ruling of this court in sustaining the objections of Dr. Spohn in refusing to disclose the knowledge acquired in said *post-mortem* examination. If the undisclosed facts would have benefited the defendant, his counsel should have made Dr. Spohn their own witness, and have asked the court to enforce the law in their own behalf. This was not done, and no exception was taken by defendant to the action of the court in sustaining said objections of Dr. Spohn. The result of the ruling was not to weaken the defendant's cause.

The evidence of the witness Benson was properly allowed to go to the jury. We can perceive no reason why he should not be permitted to testify to such facts as he had seen during the *post-mortem* examination. And this (as

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appears from the statement of facts and bill of exceptions) is what he did, without expressing any opinion as to the cause of the death of Martinez.

We believe the evidence shows that the defendant struck the deceased on the head with a stick, and that the blow caused his death. There is no evidence in the statement of facts to indicate that it could have occurred from any other cause.

It is contended by the appellant that the court erred in its charge to the jury, and in refusing to give the special instructions asked by appellant. The fourth subdivision of the charge of the court is as follows: "Express malice is where one, with a deliberate intent, kills another with an instrument likely to produce death." This is not a correct definition of "express malice." The fact that the killing is deliberately done is not sufficient to make it a case of murder in the first degree.

Express malice is where a man, with a cool and sedate mind, in pursuance of a formed design to kill another, or to inflict upon him some serious bodily injury which would probably end in depriving him of life, does kill such person. And the existence of express malice on the part of the slayer is never presumed from the mere act of killing another with a deadly weapon, by its intentional and deliberate use against the person killed. When one person kills another with an instrument likely to produce death, it would not be a killing with express malice unless the act possessed the other ingredients of murder in the first degree. The use of a deadly weapon has been frequently singled out as affording in itself a presumption in law that the killing was malicious. Mr. Wharton says: "It is incorrect to tell a jury that malice, when the weapon is deadly, is a presumption of law. But while telling them that whether there is or is not malice is a point to be determined by a scrutiny of all the facts in the case, it is proper to remind them that there are certain rules

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of probable reasoning which it is right for them to keep in view. And one of these rules is, that where a responsible person, without authority, and under such circumstances as indicate deliberation, without apparent provocation or necessity, wounds another in a vital part with a deadly weapon, then malice is to be inferred." Whart. on Hom., 2d ed., sec. 671, and cases cited in note.

The charge of the court correctly defined "implied malice." The jury did not find the defendant guilty of murder in the first degree. The appellant, therefore, cannot be heard to complain of this error in the charge in regard to express malice.

The seventh subdivision of the charge of the court is as follows: "Taking the above definition as your guide, if you believe from the evidence that the defendant killed Benito Martinez, in Nueces County, with malice impress or implied, with an instrument likely to produce death, as charged in the indictment, you will find him guilty as charged in the indictment, and the degree of the offence." It is evident that the word "impress," in this instruction, is a clerical error, and should be "express." But, admit it is correctly copied from the charge of the court; the defendant would not be entitled on this account to a reversal of the judgment, as the jury found the defendant guilty of murder in the second degree. There was no evidence in the case which required a charge upon any lower degree of culpable homicide than murder in the second degree.

The court had already, in effect, submitted to the jury, in his main charge, such of the special instructions asked by appellant as were enunciations of the law and applicable to the case as made by the evidence. The seventh subdivision of the charge of the court obviated the necessity of giving the following instruction asked by appellant, to wit: "If the jury believe from the evidence that the defendant did not intend to kill the deceased, and the State has failed to

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prove that death would ordinarily have resulted from the use of the means in the hands of the defendant, then the jury may acquit the defendant of murder, and find the defendant guilty of negligent homicide." The appellant also asked the following charge: "Malice and the intent to kill are material allegations in an indictment for murder, and must be proved affirmatively by the State." When a defendant is on trial for murder, the prosecution is not required to prove an intent on the part of the slayer to take life when he committed the offence, before he can be convicted of murder. Both under the common law and our Criminal Code, the intent to do serious bodily harm, without legal provocation, excuse, or justification, followed up by the homicide, constitutes murder. Whart. on Hom., sec. 40; *McCoy v. The State*, 25 Texas, 33. Before we pass from this question, we will take occasion to repeat what we have heretofore said in other cases, and it is this: when the judge presiding at the trial has doubts as to the propriety of giving any instruction asked by a defendant, he should solve that doubt in defendant's favor.

We now come to the consideration of the question raised in defendant's second bill of exceptions. When the jury first came into court and announced that they had agreed upon their verdict, it was handed to the clerk of the court, and read by him. It appeared therefrom that the jury had found the defendant guilty of murder in the second degree, and assessed his punishment at confinement in the penitentiary for "the term of his natural life." Whereupon the court referred the verdict back to the jury, and also referred them to the charge of the court, so as to show that the punishment should be for a term of years. The same paper was then altered by erasing the words "of his natural life," and the words "ninety-nine years" were interlined. This change was made during the absence of all of defendant's counsel, and without their being called, and without the

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consent of the accused ; to which he excepted, and the question is saved by a bill of exceptions. It is evident from the bill of exceptions that said erasure and interlineation were made by the jury, and that when the verdict was returned and read the defendant was present in court.

The statute requires, in all cases of felony, that the defendant must be present when the verdict is read, but does not require that his counsel shall also be present or be called. It is a common courtesy in cases of this kind to have the defendant's counsel called, but a failure to do this will not vitiate the verdict.

We believe that, under the circumstances disclosed by the record, it was proper for the court to refer the verdict back to the jury and call their attention to the charge of the court, as was done in this case, and that in correcting their verdict the jury simply did their duty. No wrong or injustice was done thereby to the defendant. The objections to the verdict are altogether too technical. The jury, after finding the defendant guilty of murder in the second degree, did not transcend the limit prescribed by the statute in assessing his punishment. Therefore, this court has no authority to reverse the judgment on account of the long duration of the punishment.

Believing that the accused has had a fair trial, and been legally convicted, the judgment of the District Court is affirmed.

Affirmed.

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BUN BOSTON v. THE STATE.

1. **VENUE.** — When the record fails to show that the venue of the offence was proved at the trial below, a judgment of conviction must be set aside.
2. **JUDICIAL KNOWLEDGE.** — Courts take judicial cognizance of the territorial extent of the sovereignty and jurisdiction exercised by their own government, and of the political subdivisions of their country, and their relative positions, though not of their precise boundaries, otherwise than as defined by public statutes. But whether a particular locality is or is not within a particular county is not a fact judicially known to courts.

APPEAL from the District Court of DeWitt. Tried below before the Hon. H. C. **PLEASANTS**.

The appellant was tried for the murder of a colored man named Bill Kinney, by shooting him with a gun or pistol. He was convicted of murder in the second degree, and his punishment assessed at five years in the penitentiary.

The deceased was killed near the village of Yorktown, where, early in the evening of the killing, the appellant was seen, heavily armed. The evidence for the State was circumstantial, except the testimony of a negro named John Peace, who stated that he and the deceased were riding together, about dark, when the appellant, riding a red roan horse, overtook them and asked if the deceased was not Richard Friar, and called them d—d liars when they told him that the name of deceased was Bill Kinney. The appellant, however, soon became pacified and apparently friendly, and told them he intended to get Richard Friar and three other negroes whom he named. They rode together until they got into the road leading to Victoria from Yorktown. The appellant gave his name to deceased and witness, once as Jim Taylor and once as Bill Milligan. Witness then proceeds to detail an unprovoked shooting of deceased by the appellant, and an attempt also to shoot witness.

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The defence introduced five witnesses to impeach the last witness, all of whom testified that they had known the witness for years, and his reputation for truth and veracity, which was bad; and all the five witnesses to impeach testified that they would not believe the witness referred to on oath. Some of these testified that the witness referred to, at various times, both drunk and sober, had told them that he had never seen the man who killed the deceased, before or since the killing, and that he could not recognize the man who did the killing. The testimony of the said witness, taken down before the committing court, which was signed and sworn to by him, was also presented by the defence to impeach him.

Another witness for the defendant testified that on the evening of the killing he saw a man in Yorktown whom he took to be Bill Milligan. Four others testify, for the defence, that defendant, on the evening of the killing, rode up to the house of one Spinks, ten miles distant from Yorktown, where all four were, about eight o'clock at night, which was about the time the killing is alleged to have taken place. According to these witnesses, he rode a dapple-gray horse.

Another witness, for the State, in rebuttal, testifies that he lives seven miles from Yorktown, or three miles nearer town than the witness Spinks, on the same road. That one night late, after witness had gone to bed, appellant came to witness's house for a drink of water, and woke witness up. The two talked on the gallery some time, and during the course of conversation appellant told witness that a man had passed him on the road, riding fast, and had told him (appellant) that some one had killed a negro in town. Witness does not know that this was the night of the killing. Saw no arms on the appellant.

Lackey & Stayton, for the appellant.

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W. B. Dunham, Assistant Attorney-General, for the State.

WINKLER, J. It is argued, on behalf of the appellant, that there was “no proof in the case that the offence for which he was convicted, was committed in DeWitt County, Texas, or at any place which would give the District Court of that county jurisdiction.” On the part of the State it is conceded that the statement of facts does not show that the venue was proved.

The indictment charges the appellant with the murder of Bill Kinney, committed in DeWitt County. We have carefully examined the evidence as set out in the statement of facts, which counsel on both sides agree is a full statement of all the material facts in evidence upon the trial of the cause, and is approved by the judge who presided at the trial in the District Court; and, whilst several places are mentioned by the witnesses, it is nowhere stated that any one of the places named is within the county of DeWitt, or that the offence was committed at any place which this court can judicially know to be within the limits of that county.

Whilst courts take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and of the local divisions of their country,—as, into States, provinces, counties, cities, towns, local parishes, or the like,—so far as political government is concerned or affected, and of the relative positions of such local divisions, but not of their precise boundaries, further than they may be disclosed in public statutes (1 Greenl. on Ev., sec. 6), still courts do not take notice that particular places are or are not in particular counties. *Brunt v. Thompson*, 2 Ad. & E. 789 (n. s.), top page 913, referred to by Mr. Greenleaf as *Bruce v. Thompson*, in note 7 to sec. 6, vol. 1.

Because there is no proof that the offence for which the

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appellant was tried was committed in DeWitt County, the judgment must be reversed. The venue must be proved, else the testimony will not support a verdict of guilty. *Bell v. The State*, 1 Texas Ct. App. 81, and many other cases.

Other questions of interest are raised by the bill of exceptions set out in the transcript, and which have been argued by counsel for the appellant. Inasmuch, however, as these matters have not been discussed on behalf of the State, doubtless for the reason above stated, and because these questions are not likely to arise in the same form on another trial, we have not deemed it important to pass upon them now.

For the reasons hereinbefore stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

HENRY NETTLES v. THE STATE.

1. VERDICT. — Except in trials for murder, a general verdict finding the defendant guilty, and assessing a penalty appropriate to the offence expressly charged in the indictment, is a good verdict of conviction for that specific offence, notwithstanding the indictment includes minor degrees which are ignored in the verdict.
2. SAME. — In murder cases, if the jury find the defendant guilty of murder, their verdict must, as required by the Code, specify whether it be of murder in the first or the second degree.

APPEAL from the District Court of Navarro. Tried below before the Hon. D. M. PRENDERGAST.

The indictment charged assault with intent to murder. The facts are indicated in the opinion.

Rice & McKee, for the appellant.

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W. B. Dunham, Assistant Attorney-General, for the State.

WHITE, J. Appellant relies upon two supposed errors for a reversal of this case, viz. : first, that the venue was not proven ; and, second, that the verdict of the jury is insufficient in law to sustain the judgment. In our opinion neither of these positions is tenable.

1. Upon the first proposition, the State's witness Robinson, who was a night-policeman in Corsicana, after detailing the facts in regard to his hearing a pistol-shot in the direction of "Greasy Corner," and his running immediately to the place and finding defendant hiding behind some lumber, with a pistol upon his person, one chamber of which had been discharged, made him come out, and arrested him, says : "This all occurred in the State of Texas, county of Navarro, and city of Corsicana." Harriet Cook, the party assaulted, after giving a very circumstantial account of the shooting by defendant and his arrest by the policeman, Mr. Robinson, says : "I lived at that time on the corner that is called Greasy Corner." There can be no doubt as to the transaction of which these witnesses were speaking, and the testimony of Robinson alone, as above quoted, fully and unequivocally establishes the venue of the offence.

2. The verdict of the jury is in the following words, viz. : "We, the jury, find the defendant guilty, and assess his punishment at three years' confinement in the penitentiary."

It is insisted that the charge in the indictment being for an "assault with intent to murder," and that offence being one including different degrees, that the verdict is insufficient because it does not find "*in totidem verbis*" the offence or degree of offence, *and name it*. In other words, it is sought to apply to verdicts in assaults with intent to murder the same rules of strictness and particularity which obtain in verdicts in cases of murder. Now, let us see what our

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statutes prescribe upon the subject. Amongst others we find the following, which pertain more directly and immediately to the question :

“The verdict in every criminal action must be general ; where there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such pleas are either true or untrue ; where the plea is not guilty, they must find that the defendant is either ‘guilty’ or ‘not guilty,’ and, in addition thereto, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.” Pasc. Dig., art. 3091. “Where a prosecution is for an offence consisting of different degrees, the jury may find the defendant not guilty of the higher degree (naming it), but guilty of any degree inferior to that charged in the indictment.” Pasc. Dig., art. 3095.

In the chapter relative to “assault with intent to murder,” etc., the following is contained : “The jury, in every case arising under this chapter, may acquit the defendant of the offence charged in the indictment, and may, according to the facts in the case, find the defendant guilty of an aggravated assault, or of assault and battery, or of simple assault, and affix the proper penalty to which such offence is liable by law.” Pasc. Dig., art. 2160.

It follows from these statutes, first, that the verdict in all criminal cases must be general ; second, that in crimes admitting of or including lesser degrees, where a lesser degree than the one named in the indictment is found by the verdict, the jury may acquit or find the defendant not guilty of the higher degree.

It seems that in ordinary felonies including degrees, whilst it would be eminently proper — as, in fact, it might be in all criminal cases of whatever grade — for the jury to name the offence of which they find the accused guilty, yet they are not positively required to do so, and it “*may*”

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only be proper to do so when the party is found guilty of a lesser offence than that charged in the indictment. In all such cases, we take it that a general verdict of guilty, affixing a punishment corresponding with the offence charged in the indictment, will support and sustain a judgment of conviction for that offence. This court has more than once held that where there was a general verdict of guilty, imposing punishment for a lesser degree than that charged in the indictment, it would be sustained if upheld by reference to the issues made and submitted by the charge of the court to the jury.

The rule is different in murder cases, made so by the express terms of the statute, as will shortly be seen.

In Slaughter's case, the crime charged was murder. The verdict was: "We, the jury, find the defendant guilty, and assess the punishment at confinement in the State penitentiary for the term of twelve months." 24 Texas, 410.

There the fact is patent that the punishment affixed did not correspond with, nor was it commensurate with, the penalty prescribed for murder; and the verdict contradicted itself. It was not "a true declaration, by the jury, of the issue made by the parties." Subsequent to the trial, in the District Court, of Slaughter's case, the Penal Code upon the subject of murder was amended, and the following additional provision engrafted upon it, viz.:

"If the jury shall find any person guilty of murder, *they shall also find by their verdict whether it is of the first or second degree*; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty; and in either case, if they shall find the offence of murder to be of the second degree, they shall find the punishment." Pasc. Dig., art. 2268.

Here we see that in murder cases the jury are required absolutely to find by their verdict the degree, and to name

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it in the verdict. *Buster v. The State*, 42 Texas, 315; *Murray v. The State*, 1 Texas Ct. App. 417.

The objection to the verdict in this case is not well taken. We are unable to find any error committed upon the trial of this case in the lower court, requiring that the verdict and judgment should be disturbed, and the judgment is, therefore, affirmed.

Affirmed.

W. J. SHULTZ v. THE STATE.

1. EVIDENCE—LEADING QUESTIONS.—A witness may be asked a leading question, where an omission in his testimony is evidently caused by a want of recollection, which a suggestion may assist; and a witness may relate, in his own language, what may be necessary by way of introduction to render his narrative intelligible, provided he be properly restricted when he reaches the material parts of his testimony.
2. SAME.—When, on the trial of a criminal case, evidence is excluded which might have been properly admitted without prejudice to either side, but which, if admitted, would prove a fact so remotely connected with the case as to entitle it to no appreciable weight in favor of the defendant, it furnishes no ground for the granting of a new trial, nor for a reversal of a judgment of conviction.
3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—The rules regulating the granting of new trials on account of newly discovered evidence are the same in criminal as in civil cases.
4. SAME.—A new trial will not be granted to enable the party to adduce newly discovered evidence which, by due diligence, could have been discovered before the trial; nor if the newly discovered evidence is cumulative only; nor unless it would be likely to change the result.
5. SAME.—Motions for new trials because of newly discovered evidence being addressed to the sound discretion of the court below, this court will not reverse unless it appears that the court below has not exercised its discretion according to the established rules of law.
6. CHARGE OF THE COURT.—A charge on any apparent issue is appropriate only where some evidence has been adduced in support of such issue.
7. SAME.—In a prosecution for theft, the court charged the jury that it was immaterial whether or not the party injured had been paid for the property stolen, for the reason that, if guilty in the first instance, subsequent pay-

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ment was no atonement for the offence. *Held*, correct; and that, if there was error at all in this connection, it was in admitting evidence of such payment by accused, or any one for him; but it is error of which he cannot be heard to complain.

APPEAL from the District Court of DeWitt. Tried below before the Hon. H. C. PLEASANTS.

Appellant was convicted of the theft of an ox, and his punishment was assessed at confinement in the penitentiary for three years.

No brief for the appellant has reached the reporters.

W. B. Dunham, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was tried and convicted on a charge of theft of an ox, the property of one J. M. Dow, and his punishment was assessed at confinement in the State penitentiary for a period of three years. A motion was made for a new trial, which was overruled; and this appeal is prosecuted.

It appears, from a bill of exceptions, that certain testimony of the prosecuting witness, Dow, and of the deputy inspector, Faulkner or Falconer, was permitted to go to the jury, over objections by the defendant. The objectionable testimony is set out in the bill of exceptions substantially as follows:

1. The witness Dow stated that some little negro boys told him that they had seen some parties driving the stag in a drove towards Cuero, about the time of the theft alleged in the indictment, but they did not know the parties.

2. The witness Faulkner said he refused to pass the stock as described in the bill of sale by the defendant and Meador, and thought, as near as he could recollect, that

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the defendant claimed as his own the stag branded as alleged in the indictment, and gave a bill of sale alone and separate from the joint bill of sale.

The objections to this testimony are, that what the boys said to the witness Dow was hearsay, and that the other witness had been improperly allowed to testify as to a separate bill of sale, which should have been produced as the better evidence. Taking this testimony as stated in the defendant's bill of exceptions, it would seem that well-known rules of evidence had been violated as pointed out, and that it had been improperly admitted to the jury; but when scrutinized and considered in the light of the whole of the testimony of the witnesses respectively, as found in the statement of facts, the seemingly objectionable features disappear.

The bill of exceptions does not claim to set out the whole of the testimony of the witnesses on the subject, in connection with those portions which were objected to, but only such portions as were deemed to be objectionable. Reference being had to the statement of facts, it will be seen that, so far as the statements of Dow are concerned, the portion objected to was but a portion of the introductory part of the narrative, in which he was recounting the loss of his ox and the information which led him to his search, and had no relation to the material part of the testimony. In such case it does not appear that the strict rules apply. On the contrary, it is permissible to ask a witness a leading question when an omission in his testimony is evidently caused by a want of recollection, which a suggestion may assist. 1 Greenl. on Ev., secs. 434, 435. If a witness may thus be led by counsel in the introductory portion of his testimony, we see no reason why he would not be permitted to tell, in his own language, what may be necessary, by way of introduction, to make his narrative intelligible, if his statements be properly restricted

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when he reaches the material parts of his testimony, — that is, those portions that bear upon the issues involved in the case about which he is called to testify.

As to the portion of the testimony of the witness Faulkner which is objected to, it is apparent that he is the same witness mentioned in the statement of facts as Falconer, and who was deputy-inspector; and it seems from the record that he was deputy-inspector of animals for DeWitt County in June, 1875, and about June 10th inspected a certain herd of cattle. In his testimony he states: "The ox described in the indictment was put into the herd by the defendant, W. J. Shultz. A bill of sale was executed by said defendant and John and William Meador, and it included the ox set out in the indictment, with other animals. I was not satisfied, and told Shultz he could not put the ox in the herd. He claimed authority to do so, and, I think, claimed the ox as his own, but am not positive about this. He satisfied me, and I think he executed a separate bill of sale to the ox." And then the witness goes on to say that "the bill of sale on record, and given in evidence, is the first bill of sale."

It is difficult to determine whereabouts in the testimony of this witness the statement objected to comes in, and we would be inclined to hold that the record did not sustain the exception, but for the bill of exceptions certified by the judge. This being the case, the evidence objected to must be regarded as having been admitted as stated therein. Upon the whole, we conclude that there was no such error committed in the admission of this evidence as would warrant interposition by this court. True, the witness spoke of a separate bill of sale for the ox, but it does not appear that he was interrogated as to the contents of the document, or that he stated what its contents were, or that the production of the bill of sale was called for, or cut any figure in the case. A bill of sale corresponding with that mentioned

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in another portion of this witness's testimony was admitted in evidence without objection, which appears to have been made by the defendant, W. D. Meador, and John Meador, covering some sixty-five head of cattle in as many different marks and brands. Among the brands is found one branded as the ox described in the indictment, with the word "stag" written opposite, and, for aught that appears, is the same mentioned by Faulkner in connection with his refusal to pass the ox. The animals in this bill of sale appear to have been inspected by the regular inspector, King.

In *Boone v. The State*, 42 Texas, 237, it was held, and correctly so, that "when, on the trial of a criminal case, evidence is excluded which might have been properly admitted without prejudice to either side, but which, if admitted, would prove a fact so remotely connected with the case as to entitle it to no appreciable weight in favor of the defendant, it furnishes no ground for the granting of a new trial." This being the rule, we see no reason why the rule would not apply, the terms being reversed. We cannot see that the testimony objected to was entitled to any appreciable weight, and this was doubtless the estimate put upon it by the judge who tried the case below. If the question would not have been of sufficient importance to authorize the granting of a new trial, it would not be of importance sufficient to warrant a reversal of the judgment.

A new trial was further claimed on the ground of newly discovered evidence, as shown by the affidavit of the accused and of two supporting witnesses. The rules regulating the granting of new trials on the ground of newly discovered evidence are substantially the same in criminal prosecutions as in civil suits. *Shaw v. The State*, 27 Texas, 750.

Motions of this character are to be scrutinized with much strictness, and are addressed much to the sound discretion of the court; and when the court has refused such applica-

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tion, this court will not reverse, “ unless it shall appear that the court has not exercised its discretion according to the established rules of law and the principles of adjudicated cases.” *Mitchell v. Bass*, 26 Texas, 372. “ By new evidence is meant proof of some new and material fact in the case, which has come to light since the trial.” *Mitchell v. Bass*, 26 Texas, 372.

A new trial will not be granted to enable the party to procure new testimony which could have been discovered before the trial, by the use of proper diligence. *Harmon v. The State*, 3 Texas Ct. App. 51. Nor when the alleged newly discovered evidence is cumulative only, and not likely to change the result. *Higginbotham v. The State*, 3 Texas Ct. App. 447; *West v. The State*, 2 Texas Ct. App. 209.

Testing the present application by these rules, we are of opinion that the court did not err in overruling the motion for a new trial. The most that can be said of the affidavit of the accused, and of the supporting affidavits, is that the evidence, if produced, would be but cumulative of evidence offered on the trial in proof of what appears to have been the principal ground of defence, to wit, that the accused had authority from one Parks to control animals bearing the brand upon the one in controversy. The diligence used in order to discover the testimony of the new witness, and the discovery of its materiality, are inconsistent with the apparent theory of the defence, and will not bear scrutinizing with much strictness.

On the subject of this apparent defence, the following charge was given to the jury: “ If the jury believe from the evidence that the defendant took the animal described in the indictment, believing it to be the property of one who had authorized the defendant to take and dispose of his cattle, and with no intent to deprive the owner of the value of his property, he would not be guilty of theft, and the jury should acquit the defendant.” This instruction

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could only have been appropriate upon some evidence having been adduced in support of some such defence as is herein above stated.

The following paragraph of the charge is complained of, to wit: "The jury are instructed that it is altogether immaterial whether the witness Dow has or has not been paid for the animal charged to have been stolen from him by the defendant, for the reason that, if the defendant be guilty of the theft as charged, he could not atone for the offence by paying the owner for the animal stolen; and the jury need not, therefore, consider this issue in determining the guilt or innocence of the defendant." There was no error in this charge. If there was any error committed on this subject, it was in admitting proof of the defendant or his friends having paid for the animal after it had been found and traced to and through the hands of the accused; but if there be error in admitting such proof, the appellant has not complained, nor does he now complain.

Whilst we have not deemed it important to discuss all the alleged grounds complained of in the motion for a new trial and in the assignment of errors, we have carefully considered them all, and, after so doing, find no sufficient grounds to interfere with the verdict and judgment.

The appellant, so far as can be determined by the record, has been legally tried and properly convicted, and upon sufficient testimony. The judgment is affirmed.

Affirmed.

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DENNIS JONES v. THE STATE.

MURDER — CHARGE OF THE COURT. — In trials for murder, the charge to the jury must define or explain the legal signification of the term *malice*. A conviction for murder in the first degree will be set aside, on appeal, if the jury were not so instructed, or not instructed on the distinction between express and implied malice.

APPEAL from the District Court of Washington. Tried below before the Hon. B. H. BASSETT, Special Judge.

The appellant and Emma Butler were jointly indicted for the murder of Sam Butler, by shooting him with a pistol, on May 11, 1878. Emma Butler was the second wife of the deceased, and it appears that she had been the occasion of contention and trouble between her husband and the appellant. They were all colored people, as were also nearly all of the witnesses. The appellant was separately tried.

The evidence clearly established the fact of the killing of the deceased in his own house, and that it was committed by the appellant with a pistol. A son of the deceased by his first wife was the principal witness for the State. According to his testimony, the appellant kicked open a door and fired upon the deceased without provocation, striking him in the breast, and occasioning almost instant death. On his cross-examination, this witness denied that just prior to the killing he had gone to the appellant's house and told him that the deceased wanted him (the appellant) to come over and see him on particular business. Two witnesses for the defence contradicted this denial. In some other respects there was a conflict of testimony between witnesses for the State and for the defence.

The jury found the appellant guilty of murder in the first degree, and his motion for a new trial was overruled.

F. D. Jodon, for the appellant.

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W. B. Dunham, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant, Dennis Jones, was jointly indicted with one Emma Butler for the murder of Sam Butler. A severance was granted, and the appellant was alone placed on trial. He was convicted of murder in the first degree. The charge of the court submits to the jury all the degrees and grades of homicide known to the Code, but nowhere tells the jury what malice is, or draws the distinction between murder upon express and implied malice. This should have been done. For this omission in the charge of the court, the judgment must be reversed. We deem it unnecessary to notice the other errors assigned.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

BILL TEMPLETON v. THE STATE.

1. MURDER — CHARGE OF THE COURT. — Though in a trial for murder the court below unnecessarily charged the jury on the second degree, and the accused was convicted of that degree, the conviction will not be set aside on appeal because the evidence would sustain a conviction for the first degree.
2. PRINCIPAL OFFENDERS. — All persons who act together in the commission of an offence are principals, and each may be separately tried and convicted.
3. EVIDENCE — PRESUMPTION OF INNOCENCE. — The court below instructed the jury that the accused is always presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, and the burden of proof rests always on the State, and does not shift; and, therefore, if the jury have a reasonable doubt of the guilt of the defendant, they should acquit him; and if the circumstances proved can be explained by any reasonable hypothesis other than the guilt of the defendant, he should be acquitted. *Held*, not only a correct, but a sufficient instruction on the points involved.

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4. **PRACTICE.**—Exception that the record fails to show that the indictment was returned into open court by the grand jury comes too late when primarily made in a motion for new trial.
5. **SAME.**—In a trial for murder, the court below submitted the case to the jury in the evening, with instructions to the sheriff to furnish them no supper, and no food was supplied them until next morning. It not being shown that the jury desired food, or objected to the order of the court, and no prejudice to the accused being apparent, *held*, that no error is perceptible.
6. **SAME.**—During recess of the court for dinner, the verdict was returned to the judge, who received it without a formal reopening of the court. *Held*, that under the provisions of the Code, the court, during the retirement of the jury, could properly proceed with other business, or adjourn from time to time, and nevertheless be deemed open for all purposes connected with the case before the jury. A formal reopening of the court was not necessary before the return of the verdict to the judge.
7. **CONFLICT OF EVIDENCE.**—It is the province of the jury to reconcile, if possible, a conflict of testimony; and, if not so possible, it is their prerogative to give credence to such of the testimony as they deem best entitled thereto; and when they have believed the State's witness in preference to the defendant's, and the court below has sustained the verdict, this court will not disturb the conviction on account of the conflict.
8. **EVIDENCE.**—Note, in this case, evidence held sufficient, notwithstanding a conflict of testimony, to support a conviction for murder in the second degree.
9. **NEWLY DISCOVERED EVIDENCE.**—To constitute cause for new trial, an application based on newly discovered evidence must clearly show that it has been discovered since the trial, and could not with due diligence have been discovered prior thereto; that it is material; that the witness will testify to it; that it is not offered to prove a new defence, or to impeach a witness who testified at the trial; that it is not cumulative; and that injustice has been done the accused. Stringent rules and the strictest scrutiny are necessary in regard to applications of this character.

APPEAL from the District Court of DeWitt. Tried below before the Hon. H. C. PLEASANTS.

The indictment was for the murder of John Hendley, in DeWitt County, Texas, on September 10, 1876, and the conviction was for murder in the second degree, with twenty years in the penitentiary assessed as punishment.

Thomas Lloyd testified, for the State, that the shooting was said to have been done in the Merchants' Exchange

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Saloon, the gate to the back lot of which opens upon an alley or vacant space that leads into Church Street. Witness lives on the east corner of this alley, where it connects with Church Street. On the night deceased was said to have been killed, about eight o'clock, witness heard several shots in rapid succession at the said saloon. Immediately after the firing, witness saw three men come out of the lot gate described, into the alley, each with a pistol in his hand. The witness saw them through his window, it being a very bright moonlight night. They passed within eight or ten feet of the window, walking very fast, and going towards Gonzales Street. Witness was acquainted with John Meadow, but was not acquainted with Bill Templeton and Chamberlain at that time.

Dr. S. J. North, for the prosecution, testified that a diagram exhibited was a correct diagram of the portion of Cuero in which was situated the saloon in which deceased was killed. Witness examined the wounds of deceased, and knows he died from the wounds received at the time and place charged in the indictment. Deceased was killed during the fall or summer of 1876, and was shot about or a little before eight o'clock, P. M. Witness was in the Merchants' Exchange Saloon about ten minutes before the shooting commenced, and saw witness Keller and others in the rear room of the saloon. Some of the party were playing cards. An alley runs from Esplanade to Gonzales Street, along the south side of the saloon building. Witness, on leaving the saloon in company with witness Keller, saw three men in this alley. They were standing some thirty feet back from the sidewalk; paid no attention to them at the time, and so recognized none of them. Witness and Keller then turned, and walked to the corner of Church and Esplanade Streets, and crossed and went down Church Street to Carr's house, which is on the opposite side of Church Street from the house of witness Lloyd. The firing at the saloon com-

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menced while witness was at Carr's house. Immediately after the firing, witness saw three men crossing Church Street from an open space in the rear of the saloon, passing along by Lloyd's house into Church Street. These men were facing witness when they stood in the alley, but when they got into Church Street they presented a side-view to witness. Witness was standing in the yard of Carr's house, and the men passed within thirty feet of him, in single file, following each other. Witness recognized the one in front as appellant. The moon was shining brightly, and witness saw that one of the men had a white-handled six-shooter pistol in his hand. Thinks it was appellant who had the pistol, but is not certain about this. Saw appellant as he came out of the alley and passed witness ; is satisfied it was appellant, whom he knows well, and has seen often, both by day and night. Witness thought the middle man was Sitterlee, but afterwards found he was mistaken. The man resembled Sitterlee in size and appearance. Did not recognize the man behind. Witness did not recognize appellant by his features, but by his general appearance. Witness knows John Meadow and Chamberlain. After the several shots were fired, the men spoken of passed down Church Street to Gonzales Street, and witness thinks they went up this last street. Saw but one man — thinks it was appellant — have a pistol.

M. Chaddock, for the State, testified that he was at the saloon the night of the killing ; had been barkeeper there, but was not at that time. There was a game of cards going on in the back room of the saloon that night. Witness saw deceased and Ed Sitterlee also in the room. Witness left this rear room, and went to the gallery in front, and just as he left the rear room he saw appellant, John Meadow, and Chamberlain pass through the saloon, coming in at the front and going out at the back door. Witness immediately walked forward, and as he got a chair to sit down on

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the gallery, the firing commenced. The shots were fired into the room where the men were playing cards, through the door out of which the men passed, and some shots came in through a window on the east end of the room. When witness left the rear room, the game was being played on a table near the centre of the room, and the deceased was lying on a table that stood east and west in the room. Witness thinks he saw appellant, Meadow, and Chamberlain before the time spoken of, on that night, but is not certain; noticed no arms upon the men when they passed through. Witness saw Ferguson and Ragland in the saloon that night. The next witness saw of appellant was next day, when he came in town, about one o'clock, with Meadow and Chamberlain.

T. Bunker, witness for the State, testified that he was at his house, on Court-house Street, which is parallel to Church Street, on the night of the killing. About eight o'clock, witness's wife called his attention to three men near the house, two of whom witness recognized as appellant and John Meadow. They were walking away from three horses tied about 100 yards from witness's house. They were twenty feet from the horses when witness first saw them. Appellant turned, went back to the horses, and got something, which witness took to be a gun, from the saddle. The three men went across the vacant lot towards the saloon. In about ten minutes, firing at the saloon commenced, and shortly witness saw three men running back the same way appellant and others had gone. They mounted the horses and rode rapidly away. When they got within fifty steps of witness, some one fired in their direction two or three times, one ball striking witness's fence; did not recognize any of the men this time. Witness thought he recognized one of the horses as a well-known horse usually ridden by the Meadow boys. Some one seemed to be following these

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three, but witness does not know who, or who fired the shots towards them. Saw appellant plainly in the moonlight, at a distance of about 100 yards, and recognized him by his general appearance.

Peter Alonzo, for the State, testified that he lives on the north side of Church Street, adjoining Carr's house; that he had gone for a bucket of water on the night in question, and, when returning, heard firing at the saloon. Witness ran home, and when he got in his yard he saw three men coming out of an alley in the rear of the saloon. They passed down Church Street, in front of witness's house, towards Gonzales Street. Defendant thought he recognized appellant and Chamberlain, but did not know the third. Appellant had been in witness's store about an hour and a-half before, and purchased a cigar. John Meadow had also been in the store about an hour before. Did not see any of the three named, after the firing that night; knows the three well.

Dr. Green, for the State, testified that he saw defendant in town twice during the evening of the shooting, — first, about one half-hour before the shooting, and afterwards riding back towards the main part of town. The first time witness saw him he was in front of witness's house, on horseback, talking to some one. Appellant was often in town, but witness does not remember having seen him in town often at night on horseback.

Mr. Homerton, for the State, testified that he saw the appellant, Meadow, and Chamberlain in town that night; thinks he saw them together, but is not certain; did see the first two together; very frequently saw these three men in town together at night; examined the room in which the shooting was done, and says the room was fired into from the door and window.

Keller, for the State, testified substantially as Dr. North, only that he was inside of Carr's house when the three men

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passed, after the shooting, and did not recognize, though he saw them. Dr. North was in Carr's yard at the time. Before leaving the saloon with Dr. North, Chamberlain came into the saloon through the front door, and spoke to witness, and immediately passed through and out of the same door. Witness thought he came in from the alley. When leaving the saloon, witness saw three men in the alley, but did not know them. They seemed to be looking in at the window. Saw Chaddock on the gallery of the saloon. Did not see appellant, Meadow, and Chamberlain go out at the back door.

Stratton, for the State, testified that he had just been appointed deputy-marshal, and when he heard the firing he ran to the saloon, from a place about four hundred yards east of the saloon. When witness got to where Gonzales Street crosses Church Street, he saw two men on the opposite corner, running. They had just come out of Church Street, and were turning up Gonzales Street. Supposing them to be the men who did the shooting, witness called to them to halt, but as they did not, witness shot at them, shooting in the direction of Bunker's house. They ran to where some horses were tied, mounted, and rode off in a run. The town marshal and Sitterlee had come up by this time, and they fired in the direction taken by the two men. Witness did not recognize the two men, and at first supposed them to be black, but discovered his mistake. They wore whiskers, one longer than the other. Saw but the two, but could not have seen a man ten steps ahead of the two. Appellant wore no whiskers at that time, but Meadow and Chamberlain did; the latter wearing his the longer. Witness saw neither of these three men in town that night.

Robert Willemin, for the defence, testified that he was in the saloon the night of the killing, playing cards. Some men shot through the window of the room in which witness and others were, and shot deceased, Jones, Hall, and him-

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self. Witness knows appellant and Meadow, and saw neither that night; nor did he see the witness Chaddock at the saloon that night. Ragland, Ferguson, witness, and others were in the saloon that night. Witness saw the men through the window when they were shooting, but did not recognize them; nor did he distinguish their color, or the color of their coats or hats; only saw them from the waist up, but knows neither of the men at the window was appellant. The men, on leaving, passed through the back gate of the lot.

Mike Royland, for the defence, testified that he was in the saloon a few minutes before the shooting. He saw Chaddock there, but he left a few minutes before witness left. Jim Ferguson and witness left together, and as they went off they saw three men in the alley looking in at the window, neither of whom was defendant, so far as the witness could know.

James Ferguson, for the defence, testified substantially to the same facts as the last witness, adding that, of the three men in the alley, one was taller than the others, but not so tall as the appellant.

Lackey & Stayton, for the appellant. The testimony in the case showed a deliberate murder committed by some one, and there were no facts which could warrant the giving of a charge upon murder in the second degree, thus giving to the jury an opportunity to make a compromise verdict.

The charge should be upon the very case upon trial. *O'Connor v. The State*, 18 Texas, 363; 12 Texas, 530; 13 Texas, 175; 1 Texas Ct. App. 237.

It appears that, under the directions of the court, the jury, while considering of their verdict, were deprived of food from the time of their dinner on one day until nine o'clock, A. M., of the next day. We believe that the barbarous practice of depriving jurors of necessary food while engaged in

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the trial of a cause has passed away with the age which gave it birth, and that an attempt by any such means to obtain a verdict, carried even to the extent that it was in this cause, is sufficient reason for a reversal. We cannot, in the nature of things, determine the effect of such procedure, nor ought an inquiry to be made to justify the act.

The law provides a different course (Pasc. Dig., art. 3071), and in this case has been violated. We submit that it may be said, as a matter of law, under the facts in this case, that the jury were deprived of necessary food, which probably resulted to the detriment of the appellant.

We submit that the testimony in this case, circumstantial as it was, was not sufficient to authorize a verdict, when taken in connection with the testimony of the only witness who actually saw the parties at the time the killing occurred.

The motion for a new trial, supported by the affidavits of William Scrogins, the witness, and of the appellant, ought to have been sustained. He shows diligence, want of prior knowledge of the testimony, and its materiality. 27 Texas, 752; 13 Texas, 175.

From the bill of exceptions it appears that the court adjourned at noon, and that the verdict was delivered to the judge at a time when the court was not open. We submit that such a practice is not sanctioned by law, under a proper construction of article 3087. All proceedings in a criminal trial must be done in open court.

W. B. Dunham, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant was indicted at the December term, 1877, of the District Court of DeWitt County, for the murder of one John Hendley. At the June term, 1878, of the same court, he was tried, and convicted of

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murder in the second degree, and his punishment assessed at confinement in the penitentiary for a period of twenty years.

Several errors have been assigned, which we will consider in their order.

1. That the court erred in charging the jury on murder in the second degree. It is contended, on the part of the appellant, that the testimony in the case showed a deliberate murder committed by some one, and there were no facts which could warrant the giving of a charge upon murder in the second degree.

It is believed that the evidence is of such a nature as to warrant a charge upon murder in the second degree. The charge upon murder, both in the first and in the second degree, is a clear, correct, and distinct enunciation of the law. And the fact that the court submitted a charge upon implied malice is in appellant's favor, and he cannot be heard to complain. We have examined the cases cited by appellant, and they do not sustain his position. When a defendant is indicted and tried for murder, although the facts may not imperatively require a charge upon implied malice, still, if one is given, and the jury find the defendant guilty of murder in the second degree, this would not require a reversal of the judgment, although the appellate tribunal should believe that the facts proved would sustain a verdict of murder in the first degree. *Powell v. The State*, decided at the Tyler term, 1878, *ante*, p. 234.

2. This assignment also refers to the charge of the court. There is an abundance of evidence in the statement of facts tending to show that there were three persons acting together in the commission of the murder when Hendley was killed. The portion of the charge of the court which is specially referred to in the second error assigned, and which instructed the jury that all persons who act together in the commission of an offence are principals, and each may

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be tried and convicted separately of the offence, correctly presented the law of the case as made by the proof. Pasc. Dig., art. 1809.

3. The refusal of the court to give the special instructions asked by the appellant is the next error assigned. Most of the special charges asked by appellant, abstractly considered, are correct legal propositions; and in refusing to give some of them the court would have committed an error but for the fact that the charge of the court covered the same ground, and is perfectly unexceptionable both in form and spirit. One of these special charges asked is copied from the opinion of this court in the case of *Black v. The State*, 1 Texas Ct. App. 391, and is in regard to the sufficiency of circumstantial evidence required to warrant a conviction.

The third paragraph of the charge of the court is as follows: "The accused is always presumed to be innocent until his guilt is established by competent evidence, beyond a reasonable doubt, and the burden of proof rests always upon the State, and does not shift; and if the jury should, therefore, have a reasonable doubt of the guilt of the defendant in this case, they should acquit him; and if the circumstances as disclosed by the evidence can be explained, in the opinion of the jury, upon any other reasonable hypothesis than that of guilt of the defendant, he should be acquitted." This charge, as regards the proof in cases of circumstantial evidence, laid down the rule of law correctly, and any additional instruction on the point was entirely unnecessary.

The objection to the indictment, that the records of the court do not show that it was returned by the grand jury into open court, comes too late when raised for the first time in the motion for new trial. We are satisfied from the recitals in the transcript before us, if the point had been made in time, that it would not have been well taken.

The fifth assignment of error is based upon the supposi-

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tion that the court deprived the jury of their necessary food while in retirement in this case, and that this action of the court probably resulted to the detriment of the appellant. It appears from a bill of exceptions taken by the appellant, that after the court had submitted his charge to the jury, he “then instructed the sheriff not to give the jury any supper, but that the jury retired and were not permitted to have supper or breakfast until the next day at nine o’clock, A. M.; and that after the adjournment of the court for dinner, and before opening court, the verdict of the jury was returned to the judge, but the court was not opened for the purpose of receiving the verdict.” It is the duty of the sheriff, in all criminal cases, to supply the jury with such necessary food and lodging as he can obtain. Pasc. Dig., art. 3071.

The exception taken to the order of the court in regard to the management of the jury does not show that it was made without their consent, or that the jury at any time desired food, or that the instructions complained of could have injured the rights of the appellant. If any of these facts existed, they could have been easily established by proof. From the bill of exceptions, and the daily proceedings of the trial, as given in the transcript, it plainly appears that the jury received the charge of the court on the evening of June 20, 1878, and retired to consider of their verdict; that on the morning of June 21, 1878, they were supplied with breakfast at nine o’clock; that after eating breakfast they again retired for further deliberation; and having finally agreed upon the verdict, they returned the same into court on the said 21st day of June. Before the verdict was returned, the court had adjourned for dinner.

It would be a violent presumption, and one not warranted by the facts, for this court to hold, under the circumstances, that the jury were deprived of the necessary food, which probably resulted to the detriment of the appellant; or that

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it was the intention of the court below to coerce a verdict by directing the sheriff not to furnish the jury with supper. After the court had adjourned for dinner on June 21st, and it came to the knowledge of the judge presiding on the trial that the jury had agreed upon their verdict, he was not required by law to have any formal announcement made that the court was in session, before receiving the verdict. The court may, during the retirement of the jury, proceed to any other business, and adjourn from time to time, but shall be deemed open for all purposes connected with the case before the jury. Pasc. Dig., art. 3087.

The record shows that the appellant was duly arraigned, and pleaded not guilty to the indictment. We deem it, therefore, unnecessary to notice further the sixth assignment of error.

We will depart from our usual custom, and give a detailed statement of the most material facts in this case. The testimony shows that Hendley was shot in the back room of a saloon in the town of Cuero, in the county of DeWitt, about eight o'clock at night, during the summer or fall of 1876, by parties from the rear and outside of the saloon.

Lloyd, the first witness, testified: "I heard several shots fired, in rapid succession, at the Merchants' Exchange Saloon, about eight o'clock on the night that a man was said to have been killed there. Immediately after the firing, I saw three men come out of the gate of the lot in rear of said saloon; said saloon forming one side of the inclosure of said lot, the gate opened upon an alley or vacant space that led into Church Street. The three men came out of this gate and passed down the alley into Church Street, and then turned in the direction of Gonzales Street. The men were walking fast, and each of them had a pistol in his hand; they passed within eight or ten feet of me. I was in my house, and saw them through the window. * * * I was acquainted with John Meadow, but not with Bill Templeton

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or Chamberlain, at that time. The night was a bright moonlight."

Dr. North, the second witness, testified : * * * "I saw the deceased after he was shot. I examined his wounds ; the wounds caused his death. He lived about twenty hours.

* * * I was in the Merchants' Exchange Saloon about ten minutes before the firing occurred, and I saw witness Keller and others in the rear room of said saloon, some of them playing cards. I did not see the defendant, Templeton, there. * * * When I passed out of the saloon, I saw, in an alley that runs from Esplanade Street back to Gonzales Street, and along the south side of the saloon building, three men. They were standing in the alley, some thirty feet back from the sidewalk, but I did not recognize them. I paid no attention to them. Keller and myself then turned, and walked to the corner of Church and Esplanade Streets, and crossed and went down Church Street to Carr's house, which is on the opposite side of Church Street from the witness Lloyd's house, and a little west. The firing at the saloon commenced while I was at Carr's house. Immediately after the firing, I saw three men coming in the direction of Church Street, along an alley or open space in the rear of the saloon ; they passed along by Lloyd's house, and into Church Street. While they were in the alley they were facing me. At the time they came out of the alley and passed down Church Street I was standing in the yard in front of Carr's house ; they passed in about thirty feet of me. The men were following after each other ; the one in front I recognized as the defendant. One of the men had a white-handled six-shooter in his hands. I thought it was the defendant. The moon was shining brightly, and I saw him as he came out of the alley, and as he passed me. I am satisfied it was defendant. I know him well ; had seen him often in the day-time and in the night. I took the man in the middle to be Sitterlee, but I afterwards found I was

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mistaken; the man behind I did not recognize. * * * I did not recognize defendant by his features or size, particularly, but from his general appearance. * * * The three men passed on down Church Street to Gonzales Street; think they turned the corner, and went up Gonzales Street. * * * Church Street is fifty or sixty feet wide. * * * I heard a few shots fired in the direction they went.”

Chaddock, the third witness, testified: “I was at the Merchants’ Exchange Saloon the night John Hendley was shot; there was a game of cards going on in the rear room of the saloon at the time the firing commenced. I had been for some time in the saloon. * * * I left the rear room and went to the gallery in front of the saloon. Just as I left the rear room, I saw the defendant, John Meadow, and Chamberlain pass through the saloon; they came in at the front door. I immediately walked forward, and just as I drew a chair to sit down on the gallery the firing commenced. The shots were fired into the room where the men were playing cards, through the door out of which I saw the three men pass, and through a window to the right of the door. * * * I did not see the defendant, or John Meadow, or Chamberlain again that night. I saw these three men come in town the next day about one o’clock, together; that was the next I saw of them. I was well acquainted with them at that time.”

Bunker, the fourth witness, testified: “I was at my house in Cuero, on Court-house Street, which is a parallel street with Church Street, and north of it. On the night John Hendley was killed, about eight o’clock, my wife called my attention to some men near the house. I stepped out in the yard, when I saw the defendant, John Meadow, and another man walking away from some horses hitched about one hundred feet from my house. They were about twenty feet from the horses when I first saw them; two of the

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horses seemed to be tied to the same tree ; the other one was a little distance off. * * * The men were about one hundred feet off. I could see them plainly ; the moon was shining very bright. The defendant walked back to the horses, and got something I took to be a gun. The three men then went on across a vacant lot, in the direction of the Merchants' Exchange. In about ten minutes I heard firing at the Exchange. In about two minutes more, I saw three men running back the same way the defendant and the others went off. When they got within about fifty steps of me, some one fired from the direction in which they came, two or three times, and a shot struck my fence near where I was. I then passed around my house, into the door. A minute afterwards, I went out into the yard again, when I saw two of the men riding off in a gallop, and the third one just mounting his horse, who immediately also rode off in a lope. * * * There seemed to be some one running after the three men as they came back ; don't know who he was. * * * I recognized the defendant in the moonlight by his general appearance."

Alonzo, the next witness, testified : " On the night Hendley was killed I was in Cuero, on the north side of Church Street, on the lot adjoining Carr's house, and opposite and a little east of Lloyd's. I had gone for a bucket of water, and was about fifty yards from my house, in the street, when the firing commenced in rear of the Exchange. I immediately ran home ; and when I got in my yard, I saw three men coming out of an alley in rear of the Exchange, in a little run. They passed down Church Street, in front of my house, towards Gonzales Street. I thought I knew two of the men, but I was not certain. I took one to be defendant and another to be Chamberlain. * * * I soon heard firing in the direction in which they went."

The witness Howerton testified : " I saw defendant in the town of Cuero on the night Hendley was killed ; can't

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say the exact hour ; think it was about one hour before the killing. I saw the defendant and John Meadow. I also saw Chamberlain, and I am of the impression I saw the three men together ; am not certain of this. I know I saw defendant and Meadow together. * * * I did not see either of them after the shooting."

The witness Stratton testified : " I was about 400 yards from the Exchange Saloon at the time of the firing. I ran direct towards the saloon. I had been appointed assistant marshal that day. * * * When I got to Gonzales Street, at the point where it is crossed by Church Street, I saw on the opposite corner two men, running. They had just come out of Church Street and turned to go up Gonzales Street. Supposing them to be the men who had done the firing, I called them to halt, but they paid no attention to me. They turned into a vacant lot, and ran in the direction of Bunker's house, on Court-house Street. I followed them, and fired on them. I shot in direction of Bunker's house. They ran on to where some horses were tied, mounted them, and rode off in a run. * * * I saw only two men running ; did not recognize them. * * * If there had been a man ten steps ahead of them I would not have noticed him. * * * If there was another man with the two men I saw, he would have been ahead."

Willemin, a witness introduced by appellant, being sworn, says : " Was present when Hendley was killed. He was shot between eight and nine o'clock. I, with others, was playing cards, when some one fired through the window and shot Hendley, and Jones, and one Hall, and me. I know defendant and John Meadow ; did not see them in the Exchange that night. I, Jim Ferguson, and Henry Ragland, and others, were in the Exchange. I saw the men through the window when they were shooting, but did not recognize them. I saw them plainly, and neither of them was the defendant or Meadow. I did not know Chamber-

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lain. * * * I did not see Chaddock at the Exchange that night. * * * I saw no one shooting through the door; don't know the size of the men; know nothing of the size of the room; did not know Chaddock at the time. * * * Was sitting with my back to the door. Ed Sitterlee was sitting in front of me; was shot just as he raised up from his seat. Three shots were fired before he got up; just as he got up he was shot. There was no smoke in the room; had a distinct view of them; could not tell what the complexion of the men was, — what sort of clothes or hats they had on. They poked their heads through the window; witness was about seven feet from the window; saw the men from the waist up."

Ragland, another witness for appellant, testified: "I was in Cuero when Hendley was shot; was in the Exchange about a minute or two before the shooting commenced. Witness left with Jim Ferguson, Esq. We started out of the bar-room for the hotel, and, as we passed the alley, saw three men; and two of these men, he thinks, had guns. The men were fourteen or sixteen steps from witness; they were looking through the window. * * * He knew the defendant and Meadow; did not recognize either of them among the men in the alley; thinks he might have recognized the defendant if he had been one of the three men; don't think he would have recognized Meadow; did not see Meadow or defendant in the Exchange while he was there."

Ferguson, another one of the witnesses for defendant, testified to about the same facts as the witness Ragland.

There was a conflict in the evidence; it was the duty of the jury to reconcile this conflict, if they could; and if they could not do this, to give credence to such of the witnesses whose testimony, in their opinion, was best entitled to it. The correct rule in such cases is laid down by the Supreme Court in the case of *Seal v. The State*, 28 Texas, 491,

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where the court held that it is the province of the jury to reconcile a discrepancy or conflict of testimony, if possible, and if not, to give credence to the party who, in their opinion, is best entitled to it; and when, in a criminal case, the jury have seen fit to believe the witnesses for the State in preference to those of the defendant, and the judge who tried the cause below has not seen fit to set aside the verdict of guilty, on the motion for a new trial, the conviction will not be disturbed in this court. We believe, after a careful examination of the entire evidence adduced on the trial, both on the part of the prosecution and the defence, that it was sufficient to warrant the verdict.

This brings us to the most material question presented in the record, and we are free to admit that we have had some difficulty in deciding it. The twelfth ground in defendant's motion for a new trial in the court below was on account of newly discovered evidence, and is as follows: "Defendant asks the court to grant a new trial in this case for the further reason of the newly discovered evidence contained in exhibits A and B, hereto attached, being the testimony of Wm. Scrogins and Lucinda Banks." Exhibit A is as follows, viz. :

"State of Texas }
 . v. } No. 1269.
"Bill Templeton. }

"Personally appeared before me, the undersigned authority, Wm. Scrogins, who, being sworn, on oath says that at the time that one John Hendley was killed, in Cuero, DeWitt County, on or about September, A. D. 1876, he, affiant, was just at the public well, and the defendant, Bill Templeton, whom he knows well, and did at that time, passed by him, and was talking to a negro woman, Sindie, and said affiant heard him, said Bill Templeton, say somebody is killed. This was just as the firing commenced, and there seemed to be three or four shots at that time, and then

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many more followed. Witness walked north, near Kleberg's law-office, and turned up towards the town; and passing by Frumie's store-house, saw three men coming down the street in a run, and turned up north by the corner where the restaurant or eating-house is now, and went up that street north, with pistols in their hands. I did not know the parties; know Bill Templeton, and know that I saw said three men coming down the said street, towards said eating-house, just after the last shot was fired; saw said three men until they mounted their horses, near Neches's house,—being tied to a black-jack near said Neches's house,—and said party then rode off north in a run."

The above affidavit has the name of William Scrogins signed to it, and is duly sworn to by him before a proper officer

Exhibit B is as follows: "Personally appeared before me, the undersigned authority, Judy Banks, who, on oath, says that her daughter Sindie, who died last Wednesday, soon after the arrest of Bill Templeton, and also a few days before her death, stated to affiant that it was wrong to punish Bill Templeton for killing John Hendley, about September, 1876, in the town of Cuero. Said Sindie stated that she was talking with said Bill Templeton near the public well in Cuero, in said State, and county of DeWitt, at the time the shooting occurred, when said deceased, Hendley, was killed."

Exhibit B appears never to have been signed nor sworn to by Judy Banks.

Then follows the affidavit of Bill Templeton, who, on oath, says that the testimony of William Scrogins, and declarations of Sindie Banks, made just before her death, are important to his just defence; that the evidence aforesaid has come to his knowledge since the trial of said cause, and that it was not owing to a want of diligence on part of defendant that it was not discovered before trial; that affiant

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believes the testimony of said Banks and William Scrogins is material, and will produce a different result upon a new trial. Said exhibits A and B are referred to so as to show what affiant expects to prove by said witnesses; that said affiant lives in said county and State, and expects to procure the attendance of Judy Banks and William Scrogins upon another trial, if a new trial is granted.

Courts find it necessary to lay down stringent rules, and to scrutinize such applications with great strictness, to prevent the mischiefs which would otherwise be produced. It is easy to claim the discovery of new evidence, when the claim is really unfounded.

One of the grounds prescribed by the Code of Criminal Procedure for a new trial in cases of felony is: "Where new testimony material to the defendant has been discovered since the trial. A motion for new trial based on this ground shall be governed by the same rules as those which regulate civil suits." Pasc. Dig., art. 3137.

Before a new trial should be granted on this ground, it must clearly appear (1) that the additional evidence is newly discovered; (2) that it is material; (3) that the witness will testify to it; (4) that it could not have been produced at the trial by the use of due diligence; (5) that the evidence is not offered to prove a new defence; (6) that it is not offered to impeach a witness; (7) that the evidence is not cumulative; (8) that injustice has been done him.

The Supreme Court of California say: "The party applying on the ground of newly discovered evidence must make his diligence apparent; for if it is even doubtful that he knew of the evidence, he will not succeed in his application. * * * Much must be left to the discretion of the judge below in passing upon these applications, and we should interfere with great reluctance with his action." *Baker v. Joseph*, 16 Cal. 180.

The Supreme Court of Oregon say: "Caution is par-

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ticularly necessary when the motion is founded on newly discovered evidence, both because it opens a temptation to perjury, and because its abuse would give an unfair advantage by allowing a party to take the chances of success with a part of his witnesses, and, if not successful, to avoid the consequences of his venture by a new trial, while his adversary would be remediless if unsuccessful at either trial." *Lander v. Miles*, 3 Or. 43.

The Supreme Court of Georgia say: "Applications for new trial on the ground of newly discovered evidence will be closely and critically scanned by the court." *Wallace v. Tumlin*, 42 Ga. 462.

The Supreme Court of this State say: "Such motions are received with careful scrutiny, and are held to address themselves very much to the discretion of the court; and where the court has refused an application made upon this ground, the appellate court will not reverse, unless it shall appear that the court below has not exercised its discretion according to the established rules of law." *Mitchell v. Bass*, 26 Texas, 372.

This court, in the case of *Gross v. The State*, 4 Texas Ct. App. 249, has held that, to warrant a new trial on account of newly discovered evidence, the application must satisfy the court that the knowledge of the new evidence has been acquired since the trial, and that the delay in discovering it is not attributable to want of due diligence. *Williams v. The State*, 4 Texas Ct. App. 255.

The testimony referred to in exhibit B would not be admissible if a new trial was granted. Eighteen months intervened between the filing of the indictment in this case and the trial in the District Court.

This court judicially knows that there has been an examination of the facts of this case on an application under *habeas corpus*, on appeal from the District Court, which was decided by this court at its Galveston term, 1878.

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Appellant's attention must have been directed to the importance of proving where he was at the exact time that Hendley was shot. It does appear to us it would have been one of the most natural things imaginable for him to have remembered that he was talking with the woman at the well, who is referred to in the affidavit of Scrogins; and the sworn statement of appellant, that it was on account of no want of diligence he did not discover this evidence sooner, was well calculated, in the court below, to cast suspicion on his application.

And we also believe that reasonable diligence and care in the preparation of the case should have stimulated him and his friends, in view of the long time he has had for the purpose, to have extended his inquiries throughout the length and breadth of the town of Cuero, and the surrounding country, and that, if this had been done, Scrogins's testimony could have been discovered before the trial. The administration of the law is not to be delayed or turned aside by the neglect or cunning of persons charged with crime.

We deem it unnecessary to notice any of the other errors assigned.

A very strong appeal has been made to obtain a new trial, and if it appeared that the court below, in its action upon the motion for new trial, had not exercised its discretion according to the well-established rules of law, a new trial would now be granted by this court; but, believing otherwise as this case is presented, the judgment must in all things be affirmed.

Affirmed.

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HAYWOOD GAMBLE v. THE STATE.

EVIDENCE. — It is the province of the jury to pass upon the credibility of testimony adduced before them, and, if found sufficient to sustain the verdict, the judgment will not be disturbed on account of a conflict of evidence.

APPEAL from the District Court of Houston. Tried below before the Hon. R. S. WALKER.

The conviction was for theft of a gelding.

L. W. Cooper, for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

WHITE, J. It has been earnestly insisted, in the brief of counsel for appellant, that this case should be reversed for want of certainty and sufficiency of the evidence of defendant's guilt. This is the only error complained of. If the statements of defendant's witnesses could have been relied upon as to the main fact, to wit, that he had purchased the gelding, then, undoubtedly, his acquittal would and should have followed as a matter of course.

The jury do not, however, seem to have given credence to the testimony of these witnesses, and we cannot say that in so doing they have committed an error. Besides some conflict in regard to the details of the transaction, their evidence is directly contradicted by a witness who testified to the declarations made him by defendant himself as to the manner in which he acquired possession of the gelding. All these witnesses were before the court and jury, and they were in a position better to determine than this court, from their mode and manner of testifying, what credibility should be given them. The jury, upon their oaths, have found him guilty, under a charge in which the law was most

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ably and fully explained; and the learned judge who heard the whole case has sanctioned their finding by refusing defendant a new trial. Laying aside the testimony of defendant's witnesses, the other testimony is amply sufficient to sustain the verdict and judgment.

Believing that defendant has had a fair and impartial trial, and being unable to see that any injustice has been done, the judgment of the lower court is in all things affirmed.

Affirmed.

HEZEKIAH JORDAN v. THE STATE.

MISDEMEANOR — CHARGE OF THE COURT. — In criminal actions for misdemeanor, the court below is not required to charge the jury, except at the request of counsel on either side; but when so requested, shall give or refuse such charges as are asked, with or without modification, in writing, unless the parties consent that they shall be given verbally. And if it appears by the record that the court has departed from either of these rules, the judgment of the court will be reversed, provided it appears from the record that the defendant excepted to the action of the court at the time of the trial.

APPEAL from the County Court of Walker. Tried below before the Hon. G. W. GRANT, County Judge.

The judge of the County Court delivered a verbal charge to the jury, over the objections of defendant's counsel, who excepted at the time, and saved a bill of exceptions, which was duly allowed and certified by the judge.

Randolph & McKinney, for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

WHITE, J. Appellant was tried and convicted in the County Court, upon an information, for a misdemeanor. On

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the trial, a bill of exceptions was saved by defendant, and duly allowed and certified as part of the record, showing that the county judge, over objections of defendant, delivered a verbal charge to the jury, and refused to give the written instructions asked in behalf of defendant.

The law is that, “in criminal actions for misdemeanor, the court is not required to charge the jury, except at the request of counsel on either side; but when so requested, shall give or refuse such charges, with or without modification, as are asked, in writing.” Pasc. Dig., art. 3063.

Again: “No verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties.” Pasc. Dig., art. 3064.

And again: “Whenever it appears by the record in any criminal action taken to the Supreme Court upon appeal by the defendant that the instructions given to the jury were verbal (except where so given by consent, in a case of misdemeanor), or that the district judge has departed from any of the eight preceding articles, the judgment shall be reversed, provided it appear by the record that the defendant excepted to the order or action of the court at the time of the trial.” Pasc. Dig., art. 3067. *Killman v. The State*, 2 Texas Ct. App. 222; *Goode v. The State*, 2 Texas Ct. App. 520.

Reversed and remanded.

DENNIS JOHNSON v. THE STATE.

1. **EVIDENCE.** — It is the province of the jury to reconcile conflicts of evidence, when possible; and, when not, to give credence to the witnesses who appear to them to be most entitled to it.
2. **MURDER — CHARGE OF THE COURT — CASE STATED.** — In a prosecution for murder, the court charged the jury minutely as to the different grades of homicide, embracing the law of murder of the first and second degrees,

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of manslaughter, together with the law of self-defence, malice, express and implied, the legal presumption of innocence, the reasonable doubt as to the general question of guilt or innocence, and as between the different degrees of homicide involved in the trial. *Held*, correct, in view of the facts in the case. See the opinion *in extenso* for charge on murder in the second degree held sufficient under the testimony.

3. PRACTICE. — While the jury are the exclusive judges of the facts in every criminal case, they are not the judges of the law in any case, but must receive it from the court, and be governed thereby.
4. VERDICT. — If the verdict of the jury assesses a punishment within the limits prescribed by the statute, this court has no power to interfere upon the ground that it is excessive.

APPEAL from the District Court of Houston. Tried below before the Hon. R. S. WALKER.

The appellant was indicted for the murder of Edward H. Butler, in Houston County, on December 27, 1877. The conviction was for murder in the second degree, and the punishment was assessed at twenty-seven years' confinement in the State penitentiary.

Dr. Lewis Merriwether, for the State, testified that he was a practising physician. First saw the deceased about five minutes after the stabbing. Witness testified that deceased came to his death by reason of a mortal wound inflicted upon the left side by a sharp cutting instrument, which penetrated to the cavity. Such wound could have been inflicted by the knife exhibited, and which, it is claimed, was used in inflicting the wound. Witness saw two other wounds, inflicted upon the body of deceased by some sharp cutting instrument, but neither of which would have produced death. One was on the left arm, between the wrist and the elbow, and appeared to be a cut across the bone; the other was in the back, and penetrated to the shoulder-blade. Deceased was standing on his feet when witness first saw him, five minutes after the stabbing.

John Penick, for the State, testified that he was present at the difficulty between the appellant and the deceased,

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which occurred in Houston County, Texas, on December 26, 1877. Deceased and appellant were in a ten-pin alley, betting on the rolling. The appellant put up a dollar, and the deceased put up seventy-five cents. Appellant thought that deceased had put up a dollar. Appellant won, but only got the seventy-five cents deceased had put up. They had some words about it. At dusk, about one and a-half hours after this, witness, his brother (Jake Penick), J. M. Selkirk, Alex. Hall, and the deceased were in the grocery, when the appellant came in and stood up against the bar. Presently appellant accused some one of stealing a dollar from him. Jake Penick stepped up in front of appellant and asked him if he accused him (Jake Penick) of stealing the dollar. Appellant answered, "No;" whereupon Penick walked off, and deceased stepped up and propounded the same question. Appellant answered, "Yes, you are the man;" whereupon deceased struck appellant a blow upon the lip, with two fingers. Appellant waited until deceased started off, and then plunged his knife in deceased's side. Appellant struck the deceased another blow on the arm, between the wrist and the elbow, and pushed him back on some barrels. Witness and his brother then pulled the appellant off from deceased, and deceased ran out of the house. Appellant also ran out of the house, and struck deceased two more blows,—one on the back, and one on the under side of the arm, next to the body,—making four cuts on the body. Deceased died next morning about daylight.

On cross-examination, witness says that he remained in the house, did not go out at all, and did not see appellant strike deceased outside of the house; and that appellant and deceased, while outside, were out of the sight of witness. About the time deceased came back in the house, witness heard Tom Cook ask appellant not to go back into the house. Witness does not know that defendant came back into the house after his coat and hat. The coat was not in the house,

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but was, the witness thinks, on the lumber-pile outside. Witness did not notice particularly what occurred in the ten-pin alley, but thinks the appellant won, and in taking the money down, dropped some of it; some of the money dropped, perhaps falling through the floor. When gathered up, appellant said he did not get all the money he was entitled to, when deceased said, "Here, I will give you two bits." Witness says that appellant did not get the money he thought he was entitled to, as he put up a dollar and deceased only put up four bits. Witness did not take a seat with Tom Cook on the lumber-pile, and say to Cook, when he (Cook) was suggesting or advising appellant to leave the house, to "let defendant alone,—let him have his course." Appellant, when the affair in the ten-pin alley took place, went off without trying to create a disturbance. Witness identified the knife exhibited to Dr. Merriwether, and now, as the knife with which the cutting was done.

Jake Penick, testifying for the State, corroborates his brother, the last witness, as to the occurrences in the ten-pin alley, and says that it did not amount to a difficulty. Witness, his brother John, and deceased, were neighbors and friends. Witness says that himself, deceased, and others were in the grocery, about dusk, when appellant came in and said some one had a dollar of his. Witness then asked appellant if he accused him (witness) of stealing his dollar. Appellant answered, "No;" when deceased asked the same question, and was answered by appellant that he (appellant) did not get all the money he ought to have got. The next witness saw, was the appellant forcing deceased back, and witness and his brother, John Penick, pulled him off. Did not see the wounds inflicted, but saw a knife in appellant's hand. Witness helped to dress the wounds of deceased,—four in number. Death ensued next morning.

On cross-examination, the witness says that he was the only one rolling at the time the bet was made by appellant

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and deceased, which was a side-bet, and that he took offence at appellant for saying he had not got all his money, because he (witness) took it as an insult to himself, as he was the only one rolling. Witness does not recollect that when he approached appellant, as stated, he said to appellant that he would "skin him," or "skin his G—d d—d face," or such expressions, and shook his fist in appellant's face; though he thinks it probable. Witness remembers that after he had accosted the appellant, as described, he walked back to deceased, but does not remember having words with him. Deceased then advanced on appellant, and commenced talking to him. Witness did not notice further until he saw them engaged. Does not know that deceased struck appellant in the face. Both witness and his brother John were cut by appellant in the fight. Witness did not, after cursing appellant and talking to deceased, pass a pair of brass knucks to deceased, nor any other weapon. Did not have any brass knucks; did not see deceased with any, nor did he see or know of any about there.

Job Hollingsworth testified, for the State, that on the evening of the killing, about a half-hour before sundown, appellant came to his store and asked to purchase a knife, saying he wanted a good one. He made a selection, and purchased the one now shown to witness, and identified as the one with which the cutting was done.

On cross-examination, said there was nothing in the deportment of appellant noticeable or unusual. He merely said, as is frequently said by persons purchasing pocket-knives, that he wanted a good knife. Witness now says that this occurred about an hour before the difficulty. Nothing occurred, at the time, to arrest his attention and fix the time; did not examine the timepiece, notice the time of day, nor think of it in that connection until after the difficulty. Knows it was getting late in the evening; people were not so numerous as during other hours of the day, and

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very few were about the store. Saw nothing in appellant's manner to attract attention; he merely bought the knife and left.

J. M. Selkirk, for the State, testified that he was present when the difficulty occurred. Himself, John and Jake Penick, Tom Cook, Alex. Hall, and the deceased were in Cook's grocery. Appellant came in, and said some one had a dollar of his; whereupon Jake Penick asked him if he meant to say that he (Penick) had it, to which appellant responded, "No." Deceased then asked the same question, when appellant answered, "Yes." Deceased then said something to appellant, and was pushed back by appellant, appellant at the same time striking deceased several blows. The two Penicks then pulled appellant off, but did not see either strike the appellant.

On cross-examination, witness says he is the brother-in-law of the Penicks, and that Jake Penick used strong language, and shook his fist in appellant's face, when he asked if he was accused of stealing the money. When appellant told Penick that he did not accuse him, Penick walked to or near deceased, and then deceased approached appellant and asked, "Do you accuse me of stealing your money?" Appellant answered that he did not get all the money he was entitled to; when deceased cursed the appellant. Witness could not see deceased's left hand plainly, as appellant was between them, but did see that it was in motion towards appellant, while his right hand hung down by his side. Does not know that deceased's right hand was in his coat pocket, nor does he know that deceased struck appellant in the face.

F. H. Bayne, sheriff of Houston County, testified, for the State, that he arrested appellant the morning after the difficulty, and found on his person the knife spoken of by witnesses.

Cross-examined, he says he does not know the weight of

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the several parties, but that they are all athletic young men. Surmises that Jake Penick will weigh 190 or 200 pounds; John Penick, 180 or 190 pounds; deceased, about 160 or 165 pounds, and appellant, 175 or 180 pounds. The blade of the knife referred to was about three inches long and about three-fourths of an inch wide. The State closed.

The defence introduced Hector Smith. He testified that himself and appellant were standing at the counter in Tom Cook's bar-room, when the deceased and John and Jake Penick asked appellant if he was satisfied about his dollar. Appellant replied that he did not get all that he was entitled to. Penick answered that if appellant said anything more to him, he (Penick) would "skin his (appellant's) face, a G—d d—d son of a b—h," and shook his fist in appellant's face. Appellant did nothing, but answered that he did not accuse Mr. Penick of taking his money. Jake Penick said to him that he (appellant) was a "G—d d—d white man's bully, but he could not be the bully when he (Penick) was there." Appellant again said that he did not accuse Mr. Penick of taking his money. Penick then walked back to where deceased was standing. Words passed which witness did not hear, but he saw Penick's right hand move from his coat pocket, and a corresponding motion from the right hand of deceased (as if to give deceased something), but saw nothing pass from Penick to the deceased. Deceased returned his hand to his right-hand coat pocket (blouse coat, with outside pockets), and, advancing on appellant, asked, "Do you accuse me of stealing your money?" Appellant responded that he had not got all that he was entitled to. Appellant was leaning with his back against the counter, with both hands in his pockets, and deceased stood immediately in front of him, gesticulating in appellant's face violently with his left hand, keeping the right hand in his pocket. Then deceased struck appellant a very hard blow in the face with his left hand, at the same time

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throwing up his right hand as though to strike. Appellant then rushed towards deceased, when deceased's right hand struck at appellant, falling over his head and shoulder. A scuffle ensued, and the Penicks rushed in and took hold of appellant. Witness saw no knife or weapon, nor did he see appellant strike deceased.

Witness did not vary this statement on cross-examination.

Thomas J. Cook testified, for the defence, that he was present when deceased was killed, and that he was sitting on some barrels, nearer to deceased than any one else. Doesn't know whether the appellant came to the bar-room before or after the deceased and his party. Thinks they all reached the bar-room about the same time. Something was said about a dollar,—some one asking appellant if he was satisfied about the dollar,—but doesn't distinctly remember what was said, or who said it. Jake Penick asked appellant if he (appellant) accused him (Penick) of stealing his dollar; to which the reply was in the negative. Penick then walked back to where deceased was, and some words passed between them, which witness does not distinctly recollect. Deceased then walked towards appellant, and witness about this time remarked to appellant that he had better go out, and let the dollar alone. Witness was sitting within a few feet of where appellant was standing and leaning back against the counter. Hec Smith was leaning against the counter, some ten feet from appellant. Deceased walked up in front of appellant, and asked if he thought that he (deceased) had stolen his money? Appellant announced that he had not got what he was entitled to. Deceased then cursed appellant. His (deceased's) arm was down by his side, and witness does not know that it was in his pocket. After appellant replied as stated, witness saw deceased strike appellant in the face with his left hand. Appellant then closed in on deceased and ran him back. Then the Penicks rushed in, and all four seemed engaged in a scuffle. Appellant then seemed to be

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trying to push them back, but witness now knows that he was cutting. All the three spoken of had hold of appellant at this time. Appellant did not push deceased over barrels, but against a case-shelf, and had him bent backwards. Witness was sitting on the barrels, and they were the only ones in the room.

On cross-examination, he says that the Penicks did not strike or attempt to strike appellant, that witness saw. Did not see deceased or either of the Penicks with weapons. Deceased ran out of the house, as did the appellant, as soon as he got out of the scuffle. Presently witness saw deceased circling around a horse-rack out there, and coming in the direction of the bar-room. Saw appellant coming in the same direction,—both coming pretty fast, with deceased somewhat ahead. Witness told appellant not to come in, and he stopped. Helped undress deceased, and found no weapons on him.

Reexamined, for the defence, witness says that he did not see appellant strike deceased outside of the house. Noticed that appellant had on no hat or coat. His hat was in the saloon, and one coat he had left in the ten-pin alley adjoining and behind the saloon. Witness thinks he had another coat on the gallery outside the grocery, and by the door. Witness thinks, when appellant replied to Penick's question, as stated, that Penick swore and cursed at him, and shook his fist in his face. Does not know or remember distinctly what was said, but thinks he heard something about "skinning his face."

The instructions given to the jury, on which the errors are assigned, are fully disclosed in the able argument of the appellant's counsel.

Nunn & Williams, for the appellant. 1. We submit that the court erred in instructing the jury that "when a man kills another, under circumstances showing a want

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of such provocation, justification, or excuse as the law recognizes as a justification, or such provocation as reduces the offence to manslaughter, such an act develops the existence and possession, by the slayer, of a heart regardless of social duty, and fatally bent upon mischief, and this state of mind is called malice." The effect of this instruction is, that from every killing, except such as the law would denominate manslaughter or justifiable homicide, malice would be imputed to the slayer. In other words, every homicide either is manslaughter or murder, or is justifiable. If this be true, what becomes of that grade of culpable homicide known in our law as negligent homicide?

2. The court charged the jury that, "though a homicide may take place under circumstances showing no deliberation, and seemingly in hot blood, induced by passion, and calculated to render the mind incapable of cool reflection, yet, nevertheless, if the slayer provoked and sought a contest with the apparent intention of killing the deceased, or with some dangerous weapon to inflict on him serious bodily harm that might result in death, the offence could not come within the meaning and definition of manslaughter."

The statute (Pasc. Dig., art. 2260) provides: "Though a homicide may take place under circumstances showing no deliberation, yet, if a person guilty thereof provoked a contest with the apparent intention of killing or doing serious bodily injury to deceased, the offence does not come within the definition of manslaughter." While this portion of the charge was mainly copied from this statute, and was doubtless intended to embody the principle of law contained in the latter, still, we submit, this instruction did not give the accused the benefit of such a full exposition of the law on this subject as seemed to be demanded by the peculiar facts of this case, which rendered a proper understanding by the jury, of the distinctions between murder and man-

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slaughter, of such vital importance to him. The statute uses the term "apparent," doubtless, in the sense which it is sometimes employed to express *manifest, beyond doubt, obvious*. But the more popular meaning of the word signifies *that which seems to exist, or is indicated by appearances*, rather than that which is real or actual.

Now, while the statute uses this word in the former and *quasi-technical* sense, the court followed the very language without conveying to the jury the idea which it was intended to represent. Unquestionably, this provision of the Code is intended to direct inquiry to the real intention, the actual state of mind of the accused at the time of the commission of the act; to ascertain whether, in fact, he acted upon the impulse of sudden passion, or deliberately and in pursuance of a preconceived design. The adjective *apparent* is used only in order to indicate that the intention referred to must be *manifest and beyond doubt*. This is the meaning of the statute, which is addressed to the minds of judges of law, provided for the purpose of interpreting it. The charge of the court is addressed to unlearned jurors, who necessarily receive language addressed to them in that sense in which they are accustomed to hear it used.

Therefore, while the statute might well use a term in a special or *quasi-technical* sense, a judge, in giving that statute in charge to a jury, ought to warn them of the special import of the terms employed, to guard against their attaching to such terms their more common and popular meaning. Thus, the jury might well have understood the term "apparent intention," used in this instruction, to refer to what *appeared*, from the circumstances at the time of the killing, to be the intention of the accused, rather than to what, as they were satisfied *on the trial*, was *really* his intention. They might have concluded that the *appearances at the time of the killing* indicated the existence of an intention to kill or do serious bodily harm, and upon

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this have found accused guilty of murder, when they were satisfied upon the trial that no such intention in fact existed. We submit that this instruction, in this particular, is of too doubtful and ambiguous a meaning upon so delicate a question, and one so vital to accused as this. We insist that, when the court adopted the language of this section of the Code, it was as much incumbent on him to explain to the jury the sense in which the words "apparent intention" were used, as to instruct them as to the technical signification of such terms as "malice," "the immediate influence of sudden passion," "adequate provocation," and the like.

But the court went beyond the provision of the statute, and charged the jury, in substance, that though the act of accused might *seem* to have been done in hot blood, induced by provocation calculated to render his mind incapable of cool reflection, yet if he sought and provoked the difficulty with the apparent intention, etc., his crime would not be manslaughter. To whom should it *seem* that the killing was done in hot blood, induced by passion calculated to render the mind incapable of cool reflection? To the jury, of course. Now, if all this *seemed* to them to be true, in connection with the hypothesis that the killing was done under circumstances showing no deliberation, which the judge had just before supposed, did it not, as a necessary consequence, *seem* to them that the killing was manslaughter? If so, what right had the judge to tell them to disregard this impression, however faint, and to look for an "apparent intention?" We think this is a fair interpretation of this charge, and that it is objectionable as a charge upon the weight of evidence, and therefore erroneous.

3. We submit that the verdict in this case is contrary to the evidence, in this: that it convicted the accused of a higher grade of offence than the evidence warrants. No malice was proven. The attempt to show an antecedent

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difficulty in the occurrence in the ten-pin alley, and the evidence in regard to the purchase of the pocket-knife, fall far short of showing any preconceived design against Butler's life. Besides, if these circumstances proved anything, they proved *express* malice.

The jury found against the existence of express malice, and hence must have believed that the occurrence in the ten-pin alley, and the purchase of the knife, had no relation to the killing. Therefore, the question which this verdict presents is: Do the circumstances immediately surrounding the killing show, with judicial precision, that the accused acted upon the promptings of "a wicked, depraved, and malignant spirit, a heart regardless of social duty, and fatally bent upon mischief;" or do they show that he acted upon provocation adequate to produce such a degree of passion as would impel him, in the fury of his mind, to strike down his assailant? We think the evidence clearly shows he acted upon the impulse of sudden passion, produced by an adequate cause.

Three men, all equal to himself in physical power, who were associated together, had made hostile demonstrations towards him. He had been repeatedly insulted by Jacob Penick, who was more immediately associated and acting with deceased. Both words and gestures of a most insulting nature had been used towards him. These were immediately followed up by the use of similar insulting words and threatening gestures by the deceased, which finally culminated in an assault upon his person. All this before he had raised his hand or uttered a threat. Was not this provocation sufficient to require the court to instruct the jury that it was adequate, if the accused acted upon passion suddenly engendered by it?

Here we again invite attention to the charge: "Among the instances of causes deemed to be adequate is an assault and battery by the deceased, inflicted upon the slayer, causing pain." While we admit that no words, nor

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an assault and battery of a trifling nature, not causing pain or bloodshed, would by themselves be "adequate causes," yet both combined might. Mr. Bishop, after stating the rule that words can never form an adequate cause, proceeds to say: "The books mention two qualifications of it, namely, *that words added to an assault may perhaps suffice, when the assault would not alone.*" 2 Bishop's Cr. Law, sec. 704, and authorities cited. This is not changed by our statute, which does not undertake to enumerate *every cause* which shall be deemed adequate; and while providing that neither words nor gestures, nor an assault and battery so slight as not to show an intention to inflict pain or injury, shall be considered as adequate causes, does not forbid the idea that both insulting words and gestures and an assault combined might form such adequate cause. Therefore, we think, the court should have given this rule in charge as peculiarly applicable to the facts of this case. *Maria v. The State*, 28 Texas, 698.

W. B. Dunham, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was indicted for the murder of Edward H. Butler. The indictment charges that the wounds of which the deceased died were inflicted by the appellant, in Houston County, on December 27, 1877, under which the deceased, it is averred, languished for one day, and from which he died December 28, 1877.

On the trial, the jury, by their verdict, acquitted the accused of murder in the first degree, and found him guilty of murder in the second degree, and assessed his punishment at confinement in the State penitentiary for the period of twenty-seven years.

A motion for a new trial was made, which was by the court overruled, and an appeal is prosecuted.

The assignment of errors and the motion for a new trial involve two general questions:

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1. Was the testimony adduced on the trial below sufficient to support the finding of the jury?

2. Was there any error in the charge of the court to the jury, such as would require at the hands of this court a reversal of the judgment?

With reference to the first question, we are constrained to say, after a careful examination of the testimony, as we find it set out in the statement of facts, that this must be answered in the affirmative. There is no controversy as to the fact that the deceased came to his death from blows inflicted by the hand of the accused, by the use of a deadly weapon. It is, however, urged on behalf of the appellant, either that the accused, under the testimony as detailed by the witnesses, was entitled to an acquittal on the ground of self-defence, or that, at most, he ought not to have been convicted of any higher grade of culpable homicide than manslaughter. There is some apparent conflict as to some of the facts of the *rencontre* which resulted in the homicide, between the State's witnesses on the one hand, and those put on the stand by the accused on the other. In such a state of case, it devolved upon the jury to deal with the conflict in the evidence, and if the differences between the two sets of witnesses were irreconcilable, and the jury, in order to arrive at a verdict, were compelled to give credence to one set of witnesses to the exclusion of the statements of the other set, or the witnesses offered by the adverse party, they did not, in so doing, transcend the bounds of their duty as defined by law, and this court would not be warranted in setting aside the verdict on that account, the testimony being otherwise sufficient.

As to the charge of the court, we propose to notice briefly, so far as may be deemed necessary, those portions which were complained of as erroneous in the assignment of errors, and discussed in the brief and oral arguments of the appellant's counsel. Before doing so, however, it may not be

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amiss to note generally that the judge, in his charge to the jury, instructed them minutely as to the different grades of homicide which they would consider in applying the evidence, and in coming to a conclusion as to what their verdict should be, embracing in these instructions the law of murder, and the distinction between murder of the first degree and murder of the second degree, and the law of manslaughter, and the difference between that offence and murder, together with the law of self-defence, as well as a definition of malice, and the two kinds of malice, viz., express malice and implied malice, and the legal presumption of innocence, and reasonable doubt as to the general question of the guilt or innocence of the accused, as well as between the different degrees of homicide involved in the trial.

The charge, as a whole, appears to have been prepared strictly with reference to the different aspects of the case as developed by the testimony, and with scrupulous regard for all the legal rights of the accused, and a proper appreciation of the momentous issues involved. And, furthermore, the jury were properly instructed as to their powers in determining as to the credibility of the witnesses and the weight and credit to be given to their testimony. It may not be amiss to notice, further, that no exception was taken, at the time of delivery, to the charge, or to any portion thereof, and that no additional instructions were asked by either party, nor were any explanations or modifications asked by counsel representing either side of the case; and in the motion for a new trial, even, no special objection is made to the charge of the court as given to the jury.

Notwithstanding all this, the earnestness and zeal manifested by counsel for the appellant, particularly in the oral argument before the court, would seem to demand at our hands some specific attention to those portions of the charge specifically complained of in the assignment of errors. It is stated in the third error assigned, that "it is believed

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the court erred in the charge to the jury in defining murder, in this: that it defines implied malice to arise in every act of killing, when the facts do not reduce it to manslaughter or make it excusable, and it is expressly charged, as matter of law, that such killing develops the existence and possession of a heart regardless of social duty and fatally bent on mischief. It is believed that this charge was calculated to impress the jury that such killing, as matter of law, was murder in the second degree, when it is believed the jury should have been left to decide both as to the manner of killing and as to its effect, with respect to the grade of the offence, if any, of which the defendant was guilty;” and, fourth, “the definition of implied malice is not plainly, clearly, and correctly set forth.”

The charge thus complained of as erroneous is found in the general charge of the court, in the following language, to wit: “The kind of malice known as implied malice is such state of the slayer’s mind as is implied from the circumstances attending a homicide voluntarily committed, with a deadly weapon, without excuse, justification, or such mitigating circumstances as would reduce the offence to manslaughter, and negative the existence of a wanton, cruel mind, disregarding the safety of his fellow-men or their lives, — a heart regardless of social duty and fatally bent on mischief. When a man kills another, under circumstances indicating that the act was the result of a sudden, rash conception and impulse of the mind, and not from a cool, deliberate mind and formed design to kill or do serious bodily harm, such killing would be murder in the second degree, unless other facts in the case would justify the act, as in self-defence, or reduce it to the crime of manslaughter.”

We are of opinion the criticism upon this portion of the charge is fully met, and the argument answered, by setting forth the charge as it was given to the jury. Especially is

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this so when the charge complained of is considered with reference to the preceding and succeeding portions: the former defining murder generally, and murder of the first degree, and the meaning of the term "express malice;" the latter giving the law as to manslaughter — of which hereafter — and the law as to self-defence.

"All murder committed by poison, starving, torture, or express malice is murder in the first degree, and all murder not of the first degree is murder of the second degree." Penal Code, art. 608 (Pasc. Dig., art 2267, and note).

"Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offence to negligent homicide or manslaughter, or which excuse or justify the homicide." See preceding articles of the Code.

The charge complained of is in full accord with the statute law, and adjudications thereunder, and was not an improper or erroneous instruction under the facts of the case.

But it is insisted that the court erred in not submitting the whole question to the jury, instead of charging them that a killing under the circumstances would be, in law, murder of the second degree. This argument is answered by the plain provisions of the Code of Criminal Procedure, art. 573: "The jury are the exclusive judges of the facts in every criminal cause, but not of the law in any case. They are bound to receive the law from the court, and be governed thereby." Pasc. Dig., art. 3058.

The charge of the court in defining manslaughter, whilst the charge was especially applicable to that grade, was not rendered erroneous and improper by the addition of the following restrictive clause, to wit: "Yet, nevertheless, if the slayer provoked and sought a conflict, with the apparent intention of killing the deceased, or with some dangerous weapon to inflict on him serious bodily harm that

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might result in death, the offence would not come within the meaning and definition of manslaughter; and unless the slayer would be justified under the law of self-defence, the homicide would amount to murder, and whether the murder would be of the first or of the second degree would depend upon the distinction between these offences which I have heretofore given you.”

In this we find no error, when we consider the full and explicit charge on the subject of manslaughter, and the facts proved on the trial.

Counsel cite the case of *Maria v. The State*, 28 Texas, 698, in support of the argument on this branch of the case at bar. Whilst the correctness of the ruling in that case is not questioned, it will be seen that it was in some respects exceptional; and it is clearly distinguishable from the present case, and the rulings do not apply with any perceivable force.

It is urged, in argument, that the punishment imposed is excessive. With this we have nothing to do. The punishment is within the limit prescribed by the statute law of the land, and if the law prescribes inadequate punishment for this or any other offence, the subject addresses itself to the legislative and not the judicial branch of the government.

Upon the whole, we are of opinion that the charge of the court, in every particular, was in accordance with the law, and applicable to the pleadings and the evidence; and, finding no substantial error in the proceedings, the judgment is affirmed.

Affirmed.

Statement of the case.

AARON DOYLE v. THE STATE.

RAPE — EVIDENCE. — Note evidence which, despite proof of *alibi*, is held sufficient to sustain a conviction for assault with intent to commit rape.

APPEAL from the District Court of Navarro. Tried below before the Hon. D. M. PRENDERGAST.

The indictment was for rape, committed upon the person of Fanny Hickman, a female of the age of five years, by appellant, who was a male of the age of eighteen years. The conviction was for assault with intent to commit rape, and the punishment was assessed at seven years in the penitentiary. The parties were negroes.

Harriet Hickman testified, for the State, that she is the mother of Fanny Hickman, a female child of five years, upon whom the offence was charged to have been committed. Before dark sometime, on the evening the offence was committed, witness left her children, Fanny and Jasper, a boy of ten years, at the home of witness, and started to church. She went by the house of Martha Hughes, to get the appellant to go and stay with the two children until her return. She found the appellant and Harriet Howard there, and asked appellant to go and stay with her children until her return. Appellant did not say whether he would go or not, and witness went on to church. Church "broke up" at the usual hour that night, — about nine o'clock, — and witness, in company with a man, returned to her house immediately, and found the door, which she left fastened, taken down, and the two children sitting by the fire, Fanny crying and complaining. Upon examination of the child, witness found her private parts bruised and bleeding, and found blood upon her dress. Witness also found a large spot of blood on the bed. The door was very heavy, and, having no hinges, the witness thinks it would take a man to take it down.

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Jasper Hickman, testifying for the State, identified appellant, pointing him out to the jury. About dark, the mother of witness, taking something to eat, started to church, leaving witness and his sister Fanny in the house. Witness and Fanny ate supper shortly after, and immediately the two went to bed together. After they had been some time asleep, some one entered the house and got in bed with them. It awakened witness, and he got out of bed, between the bed and wall, leaving Fanny in bed. Witness did not then know who it was that got in bed with them, nor did he know until he had made a light and built up a fire. He then recognized him, by his breeches and hat, as the appellant. Appellant then ordered witness not to build a fire, — speaking in a gruff voice. As appellant passed out of the door, he turned his head, and witness distinctly recognized him as appellant. Witness had picked cotton with appellant, and knew him well. Fanny complained that appellant had “done her bad.”

J. W. Edens, for the State, testified that the distance from Harriet Hickman's house to that of Martha Hughes, where appellant lived, is about four hundred yards, and that there are a great many negroes living in houses between the two points. Here the State rested.

Martha Hughes, for the defendant, testified that she is the mother of defendant, and was at home, at her house, with defendant and Harriet Howard, on the night when Harriet Hickman, the mother of the child alleged to have been outraged, came by and asked defendant to go and stay with her children until she returned from church. Witness states that defendant first consented but subsequently refused to go, and that defendant remained in the same room with Harriet Howard all night. That defendant slept in the same room with Harriet Howard, and retired at about nine o'clock, and did not get up until morning. Witness states that, after going to bed, defendant could not have left

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the house without getting out at the window, which would have awakened witness, and which he did not do.

Harriet Howard, for the defence, testified that she was at the house of the last witness on the night the offence is alleged to have been committed, which was a cold and disagreeable night. Witness was in the house when Harriet Hickman came by and asked appellant to go and stay with her children while she was absent at church. That witness and defendant slept in different beds, in the back room of the house. That witness and appellant went to bed at the same time, which was a little before the passenger-train came in. The door of the front room was locked, with the key in the inside of the door. Witness locked the door herself, as she and appellant sat up some time after Martha Hughes retired, and the inside of the door of appellant's and witness's room was bolted, with a table against it from the front. There was a window in this room. Witness stayed awake until the passenger-train came in that night. Appellant had been in the house up to that time since dark, and was then in bed. Doesn't know what time the passenger-train came in, but it was late at night.

E. O. Call, for the defence, testified that the passenger-train came in about ten o'clock, or half-past ten, on the night when the offence was charged to have been committed.

Laura Jackson, for the defence, testified that Harriet Hickman told her, subsequent to the alleged offence, that she (Harriet Hickman) trained her children two or three times a day in what to swear on the trial of this cause, and that if she could sink appellant she would do it. Witness had told many people that Harriet Hickman had told her this. Witness further states that Cajah Hughes, the father of appellant, asked her (witness) if she was going to swear to what Harriet Hickman had said about training her children. Cajah Hughes asked witness this in the court-house,

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on the day of the trial. Witness lives with Martha Hughes, mother of appellant.

Harriet Hickman, recalled for the prosecution, testifies that she never told Laura Jackson that she trained, or was training, her children what to say on the trial; and that she only told the children to swear to the truth.

Dr. Blair, for the State, testified that Harriet Hickman brought the child Fanny to him on the day after the offence was alleged to have been committed. Upon examination, witness, who is a physician, found her private parts swollen and bruised, and the cuticle on each side was torn up and rubbed off somewhat. Could not say that penetration had been effected. From physical "make-up" and development, would say the appellant was about eighteen years old.

Hardy & Neblett, for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

WHITE, J. Appellant, who was about eighteen years of age, was indicted for rape, alleged to have been committed by him upon the person of one Fanny Hickman, a female of the age of five years. He was convicted of an assault with intent to commit rape, and his punishment assessed at confinement in the penitentiary for a period of seven years.

It is strenuously insisted, in the very able brief of counsel, that the evidence of the identity of defendant is at once improbable and insufficient. The testimony was that of the boy Jasper Hickman, who was a brother of the girl, and whose age was nine or ten years. Jasper was the only other person in the house when the deed was committed. He knew the defendant, recognized him that night "by his

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breeches and hat," and afterwards, he says, as he was about to pass out at the door, "he looked back and I saw his face; it was Aaron Doyle. I had picked cotton with Aaron all the fall before, and knew him well." To our minds there is nothing unreasonable or improbable in his statement. It is both intelligent, positive, and clear, and seems to have impressed the learned judge and honest jury who tried the case with its truthfulness, both as to defendant's identity and guilt.

The charge of the court was a full and fair exposition of the law upon the crimes of rape and assault with intent to commit rape, and the jury were told, not only to acquit the defendant if they had a reasonable doubt of his guilt, but they were specially instructed that this reasonable doubt applied as well to the personal identity of the defendant as to the other facts going to constitute the crime.

The other defence was an *alibi*, and though two witnesses swore positively to facts establishing it, the jury did not, nor did the judge presiding, credit the truth of their testimony; on the other hand, they have credited the witnesses for the prosecution. That the crime was committed by some one is not questioned; that it was committed by defendant has been ascertained, after a most fair and impartial trial, at which all his rights were carefully guarded and he most ably defended. We see no occasion to disturb the judgment of the court below, and it is therefore affirmed.

Affirmed.

Opinion of the court.

HENRY MORRILL v. THE STATE.

1. **ADULTERY — EVIDENCE.** — In a prosecution of the paramour for adultery, the husband of the woman with whom he is charged to have cohabited is a competent witness.
2. **SAME.** — The husband or the wife is incompetent to testify against each other, except in a prosecution for an offence committed by the one against the other. But, *quære*: whether the adultery of the wife is not such an offence against the husband as qualifies him to testify against her in a criminal prosecution therefor.
3. **SAME — HEARSAY.** — It was error to permit the husband to swear that his wife's sister told him his wife cohabited with the accused.
4. **SAME.** — The common-law rules of evidence in criminal cases have been changed by the Code of this State so far only as they conflict with its provisions.
5. **SAME — PARTICEPS CRIMINIS.** — A party who was jointly indicted with the defendant on trial, but the indictment against whom has been dismissed, is a competent witness for the defence as well as the prosecution.
6. **ADULTERY.** — A single or occasional act of criminal intercourse, without having cohabited, is not adultery within the meaning of the statute. A "living together in adultery" is essential; and this is a question of fact for the jury, which they may determine from the evidence in the case.

APPEAL from the County Court of Trinity. Tried below before the Hon. J. E. B. LAIRD, County Judge.

The opinion discloses the material facts. All the parties were negroes.

No brief for the appellant.

W. B. Dunham, Assistant Attorney-General, for the State.

ECTOR, P. J. The information in this case charges that Henry Morrill, the appellant, and Easter Beavers did live together in adultery, the said Easter Beavers then being the wife of Henry Beavers.

A severance was granted in the court below, on the application of appellant, for the purpose of his getting the testi-

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mony of his co-defendant in his behalf. Easter Beavers was then placed on trial. The county attorney introduced Henry Beavers, the husband of Easter Beavers, as a witness for the State. Defendant, by her counsel, objected to the said Henry Beavers testifying in the case on the part of the State, because he was the husband of the defendant, and this not being a criminal prosecution for any personal offence committed by the said defendant against the witness. The court sustained the objection, and refused to permit the witness to testify against his wife; whereupon the county attorney dismissed the prosecution as to her, for the want of sufficient evidence to convict her; after which the appellant was tried and convicted. Henry Beavers was the only witness examined on the part of the prosecution. The appellant objected to his stating anything in his testimony going to show the criminality of his wife. We think the court properly overruled the objection.

Easter Beavers was not on trial; and even if she had been, we are not prepared to say that her husband would not be a competent witness against her in a criminal prosecution for the offence.

The Code of Criminal Procedure provides that neither the husband nor wife can in any case testify against each other, except in a criminal prosecution for an offence committed by one against the other. Pasc. Dig., art. 3113. But decisions may be found which hold that the adultery of the wife, in such sense, is a crime committed against the husband, so as to render him a competent witness against her in a criminal prosecution for the offence. *The State v. Bennett*, 31 Iowa, 24.

After the State had closed its testimony, appellant introduced said Easter Beavers as a witness for the defence. The county attorney interposed a number of objections as to why she should not be permitted to testify as a witness in the cause, which objections were sustained by the court.

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In this ruling the court committed an error for which the judgment must be reversed. One of the objections is that she, being a *particeps criminis* with the defendant, and never having been tried and acquitted, was not a competent witness for the defence.

It is a settled rule that at common law a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime. But the degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. 1 Greenl. on Ev., secs. 379, 380; Roscoe's Cr. Ev. 120; *The State v. Crowley*, 13 Ala. 172.

The common-law rules of evidence have been changed by statute in this State only so far as they conflict with its provisions. Article 1826 of Paschal's Digest is as follows: "Persons charged as principals, accomplices, or accessaries, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another; but they may claim a severance, and, if one or more be acquitted, they may testify in behalf of the others."

"Art. 3053. The district attorney may at any time dismiss a prosecution as to one or more defendants jointly indicted with the others; and the person so indicted may be introduced as a witness by either party." *Myers v. The State*, 3 Texas Ct. App. 8; *Tilley v. The State*, 21 Texas, 201.

The court committed an error in permitting the witness Henry Beavers, in giving his testimony to the jury, to state that his wife's little sister told him that Easter Beavers and the appellant had been sleeping together after she left her husband.

The only other question we propose to notice in this opinion relates to one of the instructions contained in the

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charge of the court to the jury, and which is as follows, to wit:

“If the jury believe from the evidence that the defendant had carnal knowledge of Easter Beavers more than one time, and one of them being married, then the defendant is guilty of adultery; and you will so say by your verdict, and find as above set forth.”

Our statute uses the terms, “who shall live together in adultery.” The living together in this condition is a question of fact for the jury, which they may determine from all the evidence in the case. It is clear to our minds that the statute does not intend to punish a single or occasional acts of criminal intercourse. The portion of the charge of the court under consideration does not assert a correct legal proposition, and invaded the province of the jury, on whom was the duty of drawing the legitimate inference from the facts embodied in the charge. *Parks v. The State*, 4 Texas Ct. App. 134.

The judgment of the County Court is reversed and the cause remanded.

Reversed and remanded.

S. W. MARCH v. THE STATE.

1. ABATEMENT. — Death of the appellant, pending his appeal in a criminal case, abates the entire proceedings, even though the judgment appealed from imposed a pecuniary fine. Note the distinctions taken between the effect of appeals in civil and in criminal cases.
2. SAME — PRACTICE IN THIS COURT. — Pending an appeal to this court from a judgment imposing a fine, the appellant died; and his widow now suggests his death, and moves that the entire prosecution be abated. *Held*, that the motion must prevail.

APPEAL from the District Court of Smith. Tried below before the Hon. M. H. BONNER.

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The appellant was indicted in three different cases, for assaults with intent to murder. In each case he was convicted of aggravated assault and battery, and adjudged to pay a fine of \$500. He appealed from all the judgments, but died before they were reached for decision. Mrs. Sara March, his widow, by her attorneys, suggests the death of the appellant, and moves that all the proceedings be abated.

Robertson & Finlay, for the widow of the appellant, moved for judgment abating the entire proceedings, on account of the death of the appellant.

George McCormick, Assistant Attorney-General, and *W. S. Herndon*, for the State.

WINKLER, J. In this case, the appellant was indicted and tried in the District Court on a charge of assault with intent to murder. On the trial, the jury acquitted the accused of an assault with intent to murder, but found him guilty of an aggravated assault and battery, and imposed a pecuniary fine as the penalty, upon which a judgment was entered, from which this appeal was prosecuted; the accused entering into recognizance with security, conditioned that the appellant "appear before the District Court of the county of Smith, on the second Monday of September next, there to remain from day to day and from term to term, and not depart without leave of said District Court, in order to abide the judgment of the Court of Appeals of the State of Texas."

The transcript was filed in this court at the Tyler branch, September 24, 1878. On October 8, 1878, Mrs. Sara March, the surviving wife of the appellant, by her attorneys, suggested in this court "that S. W. March, the defendant in the court below and appellant in this court, departed this life after perfecting the appeals" (the suggestion and

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motion embracing this and two other cases), and moved the court "to abate the proceedings in all of the cases." There is no controversy as to the fact that the appellant died after this appeal had been perfected, and whilst it was pending and undetermined in the court; and the only question presented here for consideration is whether, under this state of the case, the prosecution abates by the death of the appellant, or does it survive against his estate.

It is insisted, on the part of the representative of the State, "that the effect of an appeal, in this State, is simply to suspend the execution of the judgment of the court below, and not to vacate or annul it; and that, in the case at bar, the action does not abate unless the judgment be reversed and the cause remanded for a new trial;" and that, at most, this court should only dismiss the appeal, and leave the judgment below as if no appeal had been taken.

So far as we have examined the authorities cited in support of this argument, we find that they generally relate to civil actions to recover damages on account of personal injury to the person, character, or property of the plaintiff, such as come under the general description, at common law, of actions *ex delicto*, in contradistinction to actions *ex contractu*.

The main case cited by the appellee, and relied upon in resistance of the motion to abate, is *Gibbs v. Belcher*, 30 Texas, 79.

In that case, Belcher sued Gibbs for an assault and battery, and recovered a judgment. Gibbs sued out a writ of error; and after that, Belcher died, and Gibbs moved the court to abate the writ and dismiss the cause, for the reason that the cause of action was a *tort*, or an injury to the person of Belcher, and did not survive in favor of his representatives. There, Belcher was plaintiff and Gibbs defendant. It was the plaintiff, Belcher, who died, after Gibbs, the

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defendant, had moved the cause by writ of error to the Supreme Court. Here, it is the defendant who has died.

In that case, the court said, and correctly, we think, "A cause of action arising from a personal injury to a party, in no way connected with a contract at common law, dies with either party, and with it the remedy;" citing the maxim, *Actio personalis moritur cum persona*. The court then proceeded to consider the cases of *Taney v. Edwards*, 27 Texas, 224, where it was held that an appeal in actions of this character had the effect of opening the judgment below, and upon the death of either party, pending the appeal, the cause abated, and the judgment did not survive; and *Cherry v. Spright*, 28 Texas, 503, where it was said, with reference to *Taney v. Edwards*, "the correctness of this opinion was questioned, and held open for further investigation." And in the latter case, in speaking of the former, the court further says: "And from the examination we have been enabled to give the subject here, we are of opinion that it was incorrect, and in future will be regarded as overruled." It was there held that the action survived, and the motion to abate the suit was refused.

It is not a question in the present case whether, in a civil suit for a personal injury, the tort is merged in the judgment or not; and on this question we are not called upon, nor do we intend, to express an opinion. Suffice it to say, that so far as we have examined the cases relied upon by counsel for the appellee, they do not apply to, nor do they have any controlling influence on, the present one.

We are of opinion that, in a purely criminal prosecution, the case is pending so long as the question of the guilt or innocence of the accused remains undetermined, and that the proceedings are not definitely settled when the law gives the right of appeal, and the party has availed himself of that right in the manner and within the time prescribed by law. Under the general title of "Definitions," in the Penal

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Code, it is provided, in article 25, that “ a *criminal action*, as used in this Code, means the whole or any part of the procedure which the law provides for bringing offenders to justice, and the terms ‘prosecution,’ ‘criminal prosecution,’ ‘accusation,’ ‘criminal accusation,’ are used in the same sense.” Pasc. Dig., art. 1627.

An appeal may be taken by the defendant in every (criminal) case where a judgment of conviction has been rendered against him in the District Court; and when the defendant appeals in a case of felony, he shall be committed to jail; and in cases of misdemeanor, when the defendant appeals, he must likewise be committed to jail, “ unless he enter into recognizance to appear before the court [in which he was convicted] to abide the judgment of the Supreme Court,” now the Court of Appeals. Code Cr. Proc., arts. 719, 721, 722 (Pasc. Dig., arts. 3183, 3185, 3186).

As to the effect of an appeal, the Code declares as follows: “ The effect of an appeal is to suspend and arrest all further proceedings until the judgment of the Supreme Court [now the Court of Appeals] has been received by the District (or County) Court.” Code Cr. Proc., art. 727 (Pasc. Dig., art. 3191).

Now, the right of appeal being granted in every case where judgment of conviction has been rendered, and the effect of an appeal being to suspend and arrest all further proceedings until the judgment of the Court of Appeals has been received by the court in which the conviction was had, can it be said that the criminal proceeding is not still pending, and does not continue to remain so pending until the appeal shall be decided, and the judgment of the court has been received in the court below? We think not; and particularly when the law provides that the judgment in a criminal action, upon appeal, may be wholly reversed and dismissed, or may be remanded for further proceedings in the court below, as the law and the nature of the case may

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require, and that the Court of Appeals “may revise the judgment in a criminal action, as well upon the law as upon the facts,” and when the judgment shall be reversed for the reason that the verdict is contrary to the weight of the evidence, the case shall be remanded for a new trial. Code Cr. Proc., arts. 742, 744 (Pasc. Dig., arts 3208, 3210).

Our view of the law is further strengthened by noticing the difference between the conditions required in a recognizance on appeal and those of an appeal-bond in a civil suit, the conditions in a recognizance being that the defendant who is charged shall abide the judgment of the Court of Appeals. Pasc. Dig., art. 6599. In a civil suit, the bond is conditioned for the prosecution of the appeal with effect, and *perform the judgment*, sentence, or decree of the Supreme Court, or the Court of Appeals, as the case may be, in case the decision of said court shall be against the appellant. Pasc. Dig., art. 1491. In moving a cause to the appellate court, whether the Supreme Court or this court, by writ of error (which is but another mode of appeal), the bond is conditioned that the party obtaining the writ of error shall comply with the judgment, order, or decree of the Supreme Court or Court of Appeals upon such writ, and well and truly pay all such damages as may be awarded against him; which bond, the law declares, shall have the force and effect of a judgment against all the obligors, upon which execution may issue in case of forfeiture. Pasc. Dig., art. 1495. Judgment on forfeited recognizances, bail-bonds, or bonds taken for the prevention or suppression of offences, may be moved to the Supreme Court by appeal or writ of error, under the rules prescribed in civil suits. Pasc. Dig., art. 3208.

In cases of misdemeanor where no formal sentence is to be pronounced, no proceedings need be had after filing the mandate in the court below, but the cause stands as it would have stood in case no appeal had been taken, and the

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recognition of the defendant may be forfeited, or a *capias* issued to enforce the punishment adjudged, whether of fine or imprisonment, or both, in the same manner as if no appeal had been taken. Code Cr. Proc., art. 749 (Pasc. Dig., art. 3215).

This action, however, can be taken only after an appeal shall have been decided, and the mandate of the court shall have been received by the District or County Court.

But we need pursue this investigation no further. Enough has been said to show that, in any view to be taken of the subject, the clear distinction between appeals in civil suits, whether upon *contract* or *tort*, and prosecutions purely criminal, must be apparent. We are of opinion, then, that in a criminal prosecution, when the accused has taken an appeal in the manner prescribed by law, the proceeding is still pending and undetermined until the appeal shall have been decided; and that in case the appellant die whilst the appeal is pending and undetermined, the prosecution or the criminal action does not survive, but, on the death of the appellant pending the appeal, the prosecution abates *in toto*, whatever be the judgment appealed from.

In the present case, it appearing to this court that the appellant has departed this life since this appeal was perfected, and whilst it was pending in this court, undetermined, the motion to abate the proceedings must prevail, and the proceedings against the appellant disclosed by the record be abated.

This opinion applies also to cases Nos. 446 and 447, appealed by the same party.

*Ordered accordingly.*¹

¹ ECTOR, P. J., did not sit in this case.

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W. H. GRIFFIN v. THE STATE.

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HABEAS CORPUS.—The writ of *habeas corpus* is not designed to effect an appeal, or operate as a writ of error or *certiorari*; and the court, on *habeas corpus*, will not, for the purpose of discharging the applicant, consider the sufficiency of facts relied on as evidencing a former acquittal for the same offence for which he is in custody.

APPEAL from the County Court of Eastland. Tried below before the Hon. J. T. HAMMONS, County Judge.

This is an appeal from the court below refusing an application on *habeas corpus*, founded upon the plea of former acquittal of the same offence for which the appellant was held in custody.

W. H. Griffin, in propria persona.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. In the petition for *habeas corpus*, the illegal restraint of the relator is alleged to consist in the fact that he has been tried and acquitted of the same offence for which he is held in custody.

The writ of *habeas corpus* is not designed to effect an appeal or operate as a writ of error or *certiorari*; and the court, on *habeas corpus*, will not, for the purpose of discharging the applicant, consider the sufficiency of facts relied on as evidencing a former acquittal for the same offence for which he is in custody. *Perry v. The State*, 41 Texas, 488; *Darrah v. Westerlage*, 44 Texas, 388; *Ex parte Schwartz*, 2 Texas Ct. App. 74.

It furthermore does not appear from the facts developed on the trial that applicant is held for the offence of which he had been acquitted, nor, indeed, that he was under any such restraint at all as would entitle him to have it investigated upon *habeas corpus*.

The judgment of the court below is affirmed, and the relator adjudged to pay all the costs of this proceeding.

Affirmed.

WALLACE CARTER v. THE STATE.

1. **PRACTICE IN THIS COURT.**—The law requires that a statement of facts must be made out and certified by the judge of the court, during the term in which the trial was had. If made out and certified otherwise, it becomes no part of the record, and this court can consider the appeal only to ascertain whether or not the conviction has been had upon a proper indictment, and one which will support the charge and finding of the jury.
2. **SAME — STATEMENT OF FACTS.**—It is the duty of the parties in the first instance to make out the statement of facts; but if they disagree, it becomes the duty of the judge trying the case to make out the statement from those of the parties, and his own knowledge. The judge is not required to make out the statement in the first instance, and of his own motion.
3. **CHARGE OF THE COURT.**—Exceptions to the charge of the court cannot be properly considered in the absence of a statement of facts.
4. **INDICTMENT.**—See charging clause of indictment appended, held sufficient to charge murder.

APPEAL from the District Court of Houston. Tried below before the Hon. R. S. WALKER.

The indictment was for the murder of C. G. Wooten, in Houston County, on December 30, 1866. The verdict was for murder in the second degree, and the penalty assessed was seven years in the penitentiary.

The record discloses that the term of the court at which the trial was had commenced on November 7, 1878, and adjourned on December 7, 1878. The attorneys for the parties failing to agree upon a statement of facts, a paper purporting to be a statement, made out by the judge, is certified by him on January 10, 1879, and filed January 13, 1879,—more than a month after the adjournment of Court. As the indictment is the only other feature of the case considered by the court, the charging part is here appended:

“That Wallace Carter, farmer, of sound memory and discretion, late of the county of Houston and State of Texas aforesaid, on the (30th) thirtieth day of December, in the year of our Lord one thousand eight hundred and sixty-six, in the county of Houston aforesaid, with force and

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arms, in and upon the body of one Calvin G. Wooten, an assault did make, and a certain double-barrelled shot-gun, the same being a deadly weapon, which he, the said Wallace Carter, in his hands then and there had and held, which said gun as aforesaid was charged with gunpowder and leaden bullets, he, the said Wallace Carter, did then and there discharge and shoot off to, at, and against him, the said Calvin G. Wooten, a man in being, within the State of Texas aforesaid, feloniously, wilfully, and of his, the said Wallace Carter's, express malice aforethought, inflict four mortal wounds in and upon the breast of him, the said Calvin G. Wooten, of which said mortal wounds he, the said Calvin G. Wooten, then and there died; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Wallace Carter the said Calvin G. Wooten, in manner and form aforesaid, feloniously, wilfully, and of his express malice aforethought, did kill and murder the said Calvin G. Wooten, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State."

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. This is an appeal from the judgment of the District Court, by which the appellant was convicted of the murder, in the second degree, of one Calvin G. Wooten, alleged to have been committed on December 30, 1866.

The following errors are assigned: "1. The court erred in refusing the motion for a new trial. 2. The verdict is contrary to the facts as adduced on the trial. 3. The verdict is contrary to the law and facts. 4. The court erred in the charge to the jury, in this: that he charged the jury might find the defendant guilty of murder in the second degree, when the facts authorized no such charge. 5. It is

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apparent from the verdict that the jury had doubts in regard to the defendant's guilt, and he was not allowed the benefit of such doubt." The several grounds set out in the motion for a new trial relate to and are based upon the supposed insufficiency of the evidence, under the law and the charge of the court, to warrant the jury in convicting of murder in the second degree.

It will be readily perceived that whether the errors assigned are well founded, or otherwise, depends upon the evidence adduced on the trial, which could only be ascertained from a proper statement of facts, prepared at the trial below and embodied in the record.

On looking into the transcript of the record, we find what purports to be a statement of facts, to which is appended the following: "I, Richard S. Walker, district judge, Third Judicial District, presiding judge on the trial of the above-entitled case, in the county of Houston, at the November term, 1878, thereof, do hereby certify that the county attorney, Earle Adams, Esq., in behalf of the State, and W. A. Stewart, Esq., attorney for the defendant, failing to agree on a statement of facts in said case, and they having submitted to me their respective statements, I, from said statements so furnished me, and from my own knowledge, have made out the foregoing statement of facts, and do hereby certify that the same is, in substance, a correct and exact statement of the facts of the case as given in evidence on said trial."

This certificate is signed by the judge, and dated January 10, 1879, and appears to have been filed by the clerk of the District Court, January 13, 1879. The counsel representing the State calls our attention to the fact that the paper purporting to be a statement of facts was not prepared during the term of the court at which the case was tried. The record shows that the court convened November 7, 1878,

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and adjourned December 7, 1878, between which two dates the trial was had; and that, as we have already seen, the paper which is claimed to be, and doubtless was intended as, a statement of facts was not signed and certified by the judge until January 10, 1879, nor filed until January 13, 1879, and after the expiration of the term of the court, and after the final adjournment for the term had taken place, agreeably to the record.

The law requires that a statement of facts must be prepared during the term (*Brooks v. The State*, 2 Texas Ct. App. 1), and be prepared in a criminal prosecution in the same manner as in civil suits (Code Cr. Proc., art. 673),—that is, as prescribed in article 1420 of the Digest.

The statement of facts constitutes no part of the record, except for revision on appeal. *Slaughter v. The State*, 24 Texas, 410. It must be prepared during the term. After its expiration, the court has no control over the subject. *Ferrell v. The State*, 2 Texas Ct. App. 399. And if prepared in any other manner than that prescribed by law, it cannot be considered for any purpose whatever. *Henrie v. The State*, 41 Texas, 573; *Brooks v. The State*, 2 Texas Ct. App. 1, and authorities there cited. Without a statement of facts, the action of the court below in refusing a new trial on the evidence will not be revised. *Keef v. The State*, 44 Texas, 582; *Koontz v. The State*, 41 Texas, 571. The judge is not required to prepare a statement of facts in the first instance; this duty is imposed upon the counsel. *Longley v. The State*, 3 Texas Ct. App. 611. Yet when the statement is properly prepared and certified to by the judge, and in due time, the existence of the facts invoking the action of the judge will be presumed, in the absence of anything being shown to the contrary.

There being no statement of facts such as we can consider, this court can only consider whether the conviction

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was had upon a proper indictment, and whether it will support the charge and the finding of the jury. *Longley v. The State*, 3 Texas Ct. App. 611, and authorities cited.

Looking, then, to the indictment and to the charge of the court, we find that the indictment, when tested by the provisions of the Code and the rulings of both the Supreme Court and of this court, is a sufficient indictment for murder. The charge of the court seems to have been prepared with ability and care, and with a proper appreciation of the rights of the accused and of the magnitude of the single issue involved, — the guilt or innocence of the accused, of the crime charged against him, under his plea of not guilty. The exceptions taken to the charge cannot be properly considered in the absence of a statement of facts; yet it seems to have properly presented the law as to every legitimate defence which could have been interposed. The transcript discloses no exception to the indictment or to the general charge of the court, and none is perceived.

So far as we are able to determine from the record before us, and which we have examined with great care, in the absence of any appearance of counsel for the appellant, either in person or by brief, we conclude that the appellant has been fairly tried and properly convicted; and, there not appearing any material error so presented that we can consider it, the judgment of the District Court is affirmed.

Affirmed.

JOHN CASEY v. THE STATE.

AFFIDAVIT. — In a prosecution by information, an affidavit is as indispensable as the information, and both must set out substantially the same offence against the law. Neither will stand without the other.

APPEAL from the County Court of Madison. Tried below before the Hon. W. C. GIBBS, County Judge.

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The information and conviction were for disturbing religious worship.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The exception to the information should have been sustained, for the reason that it was not founded upon any sworn complaint or affidavit, without which it had no foundation to stand upon.

In prosecutions by information, a proper affidavit is as essential as an information, and both should set out substantially the same offence against the law. Gen. Laws 1876, p. 20, sec. 8. The judgment is reversed, and, the objection going to the foundation of the prosecution, it is dismissed.

Reversed and dismissed.

TOBE HAMPTON v. THE STATE.

1. PRACTICE—POSTPONEMENT OF TRIAL. — In a prosecution for felony, the case was called at noon, when both parties announced ready for trial, and the case was set for hearing in the evening session; when it was discovered that other business had priority, and, on motion of the county attorney, the case was further postponed, and set for the first trial on the succeeding day. When called accordingly, the principal witness for the State was absent, and, upon motion of the county attorney, a further postponement for a reasonable time to allow the witness to reach the court-house, was granted, over the objections of defendant. The *scire facias* docket was taken up and disposed of, and then the witness was again called, and, not answering, a forfeiture was taken on his attachment-bond, and an *alias* attachment, returnable *instantly*, was taken. The witness appearing during the day, the trial was had. *Held*, that this direction of the business of the court was not error.

2. EVIDENCE. — The general rule is, that the declarations of a defendant charged with theft, made at the time the stolen property is first found in his possession, may be given in evidence, and, if he gives a reasonable and satisfactory account of his possession, it devolves upon the State to prove

5	463
32	454

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its falsity. But the admission of such declarations must be limited to the time when he is first found in possession, or when he first ascertains that his right is questioned. He cannot be permitted to introduce his declarations made before an adverse claim is set up or suspicion attached to his possession.

8. INDICTMENT — ALLEGATA. — Unnecessary descriptive allegations do not vitiate an indictment, but must be proved.

APPEAL from the District Court of Gonzales. Tried below before the Hon. E. LEWIS.

The conviction was for theft of a horse-colt, and the punishment was assessed at five years in the penitentiary, at hard labor.

The principal question of interest in this case is the refusal of the court to permit the witness Jones to detail the declarations of the appellant as to his possession of the colt, in reply to questions propounded in regard thereto by witness.

Fry & Davidson, for the appellant. The court erred in not permitting the witness John Jones to testify in regard to what the defendant said in regard to his possession of the colt or horse alleged to have been stolen :

1. Because the State had already elicited from the witness Jones the evidence of a trade made between himself and defendant for this colt, setting forth what he had traded defendant for the colt. Then, of course; defendant was entitled to all that was said by witness and himself, and all that occurred at said trade in relation to the horse or colt. Pasc. Dig., art. 3129. Defendant was entitled to his declarations made at the time of the trade. 2 Texas Ct. App. 388, 535 ; 3 Texas Ct. App. 54, and authorities therein cited.

Defendant was entitled to give by this means his account of his possession, and, if reasonable, it must be disproved by the State. 26 Texas, 211.

The court should have permitted witness M. B. Hampton

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to testify to the authority defendant had to control Blackwell's horses; and if Hampton heard Blackwell authorize defendant, or carried a message from Blackwell to defendant authorizing him to gather his (Blackwell's) horses, he (Hampton) should have been permitted to testify to this fact. This would have been good to show any criminal intent, or want of it. The court held this authority must be in writing. If evidence of a verbal sale or purchase is good to show a want of criminal intent, it is certainly so in this case. See 40 Texas, 31.

Verbal authority to govern or control and gather stock is sufficient to exonerate from crime. 40 Texas, 74, 75.

We also call attention to the remarks made by the court before the jury, as set out in the bill of exceptions, that "if Mr. Blackwell did authorize defendant to gather his horses, that did not authorize defendant to take Mr. Houston's horse." The courts, in deciding questions of evidence, or objections thereto, have no authority to comment upon the testimony, or make remarks calculated to injure a defendant's rights.

The court erred in the third subdivision of his charge. There was no evidence of any circumstances, before the jury, to be taken in connection with the recent possession of this colt or horse. Jones testified that in the summer of 1874 he traded with defendant for this colt, and Houston testified that said colt was taken in April, 1874. This, in short, is the whole case of theft made out by the State. We think this charge is upon a supposed statement of facts that was not before the jury. The court assumed there were certain circumstances, beside recent possession, in evidence before the jury, which is or was a false assumption, and then charged upon the weight of the testimony. 2 Texas Ct. App. 183; 23 Texas, 201.

The motion in arrest of judgment should have been sustained, because there must be a specific crime charged. It

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must be a colt or a horse. Pasc. Dig., art. 2409; 28 Texas, 644. The verdict and judgment are insufficient.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was indicted, tried, and convicted for the theft of a horse-colt, the property of one Robert A. Houston. The defendant made a motion for new trial, and also a motion in arrest of judgment, both of which were overruled, and the case has been brought by appeal to this court.

The proof shows that the colt was missing from its accustomed range, near the home of its owner, in Gonzales County, about the month of April, 1874, and that it was traded by the defendant to John Jones in the summer of 1874.

The first assignment of error is, that "the court should not have postponed the trial after announcement by both parties, and the forfeiture of R. A. Houston's bond, as per bills of exceptions Nos. 1 and 2."

In said bills of exceptions it appears that at the fall term of the District Court of Gonzales County this case was regularly called in the forenoon of said day, when both parties announced ready for trial. It then being about twelve o'clock, the case was set for the first thing in the afternoon. In the afternoon, there having been another cause set for the same hour, this case was reset for the first thing on Thursday morning. The court met on Thursday morning at half-past eight o'clock, when the counsel for the State announced the absence of the principal witness for the State, to wit, Robert A. Houston, and asked that the cause be further postponed for a reasonable length of time to allow the witness time to reach the court, before being required to announce; which request was granted, over the objections of the defendant. The *scire facias* docket

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was then taken up and considered until a quarter-past nine o'clock, when the case was again called for trial ; whereupon, the witness Robert A. Houston being again called, on the motion of the county attorney, a forfeiture was taken as to the witness Houston on his attachment-bond, and an *alias* attachment was issued by the court for said witness, returnable *instanter*, and a further postponement granted until said witness could be found, or until the close of the day.

During all this time, the defendant was insisting on a disposition of the cause for the term. The witness Houston was brought into court during the day the *alias* attachment was issued for him, and the parties then went to trial.

We do not believe that the court acted improperly in thus directing the business of the court, or that any injustice was done to the defendant by postponing the case to secure the attendance of the witness Houston. It is not pretended that any of the defendant's witnesses had absented themselves after his announcement of readiness for trial, or that he asked for a continuance on account of any absent witness.

The defendant contends that the court erred in not permitting the witness John Jones to testify as to what defendant said in regard to his possession of the colt alleged to have been stolen, as set out in his bill of exceptions No. 3.

The county attorney called John Jones as a witness for the prosecution, and proved by him that he bought the horse-colt in question from Tobe Hampton, the defendant ; and on the cross-examination, defendant's counsel asked the witness Jones what defendant said in regard to the colt he was trading to witness, — how he, the defendant, said he came in possession of said colt. He then asked the witness if defendant said anything, at the time of sale or purchase of the colt, about his authority to gather the horse-property of John Blackwell, running in Gonzales County, on the west side of the river, and, if so, what it was ; and whether or not defendant told witness that the colt he then was offering to

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trade was the property of John Blackwell, and that he (defendant) would see Mr. Blackwell and get the colt from him, and trade it to witness; to all of which the county attorney objected, and the court sustained his objection; and to which ruling the defendant objected, and took a bill of exceptions.

This action of the court in sustaining the objections of the county attorney to the evidence offered presents to us the most difficult question in the entire record.

The declarations of a defendant charged with theft, made at the time the stolen property is first found in his possession, may be given in evidence by him; and, if he give a reasonable and satisfactory account of his possession, as a general rule it devolves on the State to show that his account is false. It is often difficult to determine as to the admissibility or exclusion of such declarations. It is safer, if there be a question of doubt or uncertainty, to solve the doubt by ruling in favor of the accused. In the case at bar, we believe that the District Court acted right in not permitting the witness Jones to answer the questions under consideration, which were asked him by counsel for the defendant.

The rule of evidence which allows such declarations to be given in evidence by the accused is limited to the time and to declarations made by him when he is first caught in possession of the stolen property, — when he first ascertains, or it is made apparent to him, that his right to the ownership of said property is questioned by some one else. The declarations of a defendant when first caught, or found in the possession of the stolen property, — when he is first approached, and feels called upon to explain the nature and extent of his possession, and how he came by the stolen property, — are admissible in evidence, either for or against him.

This rule of evidence, however, does not permit a defend-

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ant on trial for theft to introduce his own declarations, made when first seen in possession of stolen property, as to how he came by it, before any adverse claim to the property is set up, and before any suspicion rests upon him of being the thief.

The remarks of the judge who presided at the trial, to which the defendant took the fourth bill of exceptions, were but reasons given by the presiding judge, to counsel, for his rulings upon objections to evidence, and no injury could possibly have resulted from such remarks as were made by him to the defendant's counsel. As was said by this court in the case of *Davis v. The State*, 3 Texas Ct. App. 101, "A judge cannot be too careful in avoiding remarks relating to the evidence, or tending in the slightest degree to convey to the jury his opinion of the evidence offered by either party."

The case was fairly submitted to the jury in the charge of the court. The evidence is sufficient to sustain the verdict of the jury.

The grounds set forth in defendant's motion in arrest of judgment are not well taken. The indictment charges the defendant with a specific offence, to wit, the theft of a colt. The allegation that the animal was a *horse*-colt was an unnecessary descriptive allegation, but the State proved that the property taken was of the description set out in the indictment. Unnecessary descriptive allegations do not vitiate an indictment, but must be proved. *Warrington v. The State*, 1 Texas Ct. App. 173; *Soria v. The State*, 2 Texas Ct. App. 298; 1 Bishop's Cr. Proc., sec. 485.

Finding no error in the record which would justify this court in reversing the case, the judgment is affirmed.

Affirmed.

LOUIS RICHARDSON v. THE STATE.

1. **DISTURBING RELIGIOUS WORSHIP.** — In order to constitute this offence, the proof must show that there was assembled, at the time of the alleged disturbance, a congregation for the purpose of religious worship, and that the congregation was disturbed in one of the ways set out in the statute; and, moreover, the disturbance must appear to have been wilful. See the opinion *in extenso* for definition of disturbance.
2. **SAME—CASE STATED.** — Officials of a church, acting under the church discipline, as they construed it, notified the minister that they would hold a meeting to take action in regard to his alleged misconduct, and invited him to attend. The minister did not attend, and the officials resolved to suspend him until his conduct could be passed upon by superior authority; and they delegated the accused, who was a steward of the church, to carry out the resolution. Accused did so by approaching the stand after the congregation had assembled, but before services had commenced, and notifying the minister of the action of the officials, and that he would have to quit preaching until the “elder” had passed upon his conduct. *Held*, that even if the proof brought the accused within the *letter* of the law, still it does not bring him within its *reason* and *spirit*, nor the mischief it was intended to remedy; and further, that it does not show a *wilful* intent to disturb the congregation.

APPEAL from the County Court of Gonzales. Tried below before the Hon. J. S. CONWAY, County Judge.

The opinion states the case.

Ponton & Fry, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant and two others were charged by information, under the statute, with wilfully disturbing a congregation assembled for religious worship. The charging portion of the information is as follows, after stating time and venue: “then and there unlawfully and wilfully disturb a congregation assembled for religious worship at Wesley Chapel Church, in said county, by loud and vociferous talking, and by the use of threats and other noises

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caused said congregation to be disturbed while said congregation were conducting themselves in a lawful manner.”

As to two of the defendants the prosecution was dismissed, and this appellant was put on trial alone. He was found guilty, and a fine of \$25 imposed ; and, after a motion for new trial overruled, this appeal is prosecuted.

The trial below divulged about this state of case : The congregation alleged to have been disturbed was a church or society of colored people belonging to the Methodist Church. One Cyrus Shanks was the minister. The appellant was one of the stewards of the church. Of the two others jointly charged, but as to whom the prosecution had been dismissed, one was a steward and the other the class-leader. The church had but two stewards. Prior to the alleged disturbance, rumors had been circulated imputing to the minister improper intimacy with a female member of the congregation, a married woman. It was proved on the trial that, on the night previous to the alleged disturbance, the class-leader mentioned the subject to the officials of the church, and a meeting of the officers of the church was called, and the minister was notified by the class-leader of the time and place of the meeting, for the purpose of investigating the minister's conduct.

In this connection, we make the following extract from the testimony of the class-leader, who was put on the stand by the accused : “ We held our meeting, but Shanks did not attend. Henry Christmas, a Methodist preacher, Louis Richardson, who is a steward, and another preacher, and myself were present. We came to the conclusion that it was our duty to suspend Parson Shanks from preaching, until the elder could be heard from. The preacher said this was the right way, and we appointed Louis Richardson to carry out this resolution. We thought it was wrong for the officers to allow a man to preach when such charges were circulated against him. When we went to the church

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that night, Henry Christmas, Louis Richardson, and myself went in together; and Louis went up in front of the stand, and said, 'Brother Shanks, you will have to quit preaching until charges against you are investigated by the elder.' Shanks took up his stick and hat, and said, 'I am one man, but I am not afraid of all three of you.' Louis said, 'I can read the discipline, and I know my duty as steward, and you will have to come down until we hear from the elder.' Louis spoke in a mild manner. We all thought we were doing our duty. When we went in, Shanks was not preaching, but was talking about what the committee had him up about the night before."

The statement of this witness is borne out, and not contradicted by any other testimony in the case. It was admitted without objection, and the above extract is set out for the reason that, in our opinion, it shows the *animus* which actuated the appellant on the occasion of the alleged disturbance, and presents the question whether, under this statement of the facts, the appellant was guilty of a violation of the law or not.

The statute provides that "any person who, by loud or vociferous talking, or swearing, or by any other noise, wilfully disturbs any congregation assembled for religious worship," etc., "shall be deemed guilty of a misdemeanor," etc.

The offence created by the statute consists in *wilfully disturbing* the character of congregation mentioned, for the purpose mentioned, and in the manner mentioned in the act. So that, to constitute the offence, there must be a congregation assembled for religious worship, and that congregation, so assembled, must be *disturbed*, — that is, agitated, roused from a state of repose, molested, interrupted, hindered, perplexed, disquieted, or turned aside or diverted from the object for which they are assembled; and the act which causes the disturbance must be wilfully done, — that is,

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willingly, designedly, purposely, obstinately, or stubbornly done. These elements combining, the offence would be complete. Does the proof show that this appellant, by loud and vociferous talking, and other noises, disturbed the congregation assembled for religious worship, and conducting themselves in a lawful manner, and did he so cause such disturbance wilfully?

Mr. Bishop, in treating of the application and interpretation of the law of statutory offences, condenses the subject into this statement: "Whenever the thing done comes not within the mischief which evidently the statute was intended to suppress, though it comes within its words, the person doing the thing is not punishable; while, on the other hand, a person may defend himself by showing, if he can, that either the main part of the enactment, or some clause put into it to create an exception, is so unguardedly worded as to open an escape for him through the letter, his act being still a complete violation of its spirit." Bishop's Stat. Cr., sec. 230. So, likewise, the thing may be excepted out of general words, "for the reason that to include it would be contrary to the general spirit and policy of the law." Id. 231.

This author proceeds, in the same section, to this effect: "Perhaps under this head might be embraced cases like those already alluded to, where a prohibition in general terms is held to apply only to wilful transgressions, it being a principle of the common law that no one shall suffer criminally for an act in which his mind does not concur." And again, in section 232: "This doctrine is usually stated in terms somewhat narrower than those last employed; in substance, that the case must come, not only within the words of the statute, but also within its *reason and spirit, and the mischief it was intended to remedy.*"

The object and intent of the law on which this prosecution is based was evidently to protect congregations assem-

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bled for religious worship from wilful disturbance; yet, to hold this conviction proper and legal, it must be so construed as to bring within its provisions the officers of the church or congregation who may attempt, in a quiet, peaceable, and orderly manner, to protect the same congregation from imposition, and perhaps serious detriment, by maintaining in the pulpit one whom they regard as totally unfit for the position.

We are of opinion that, under the authorities cited, the statute does not bear this interpretation; and that although the proofs should bring the accused within the letter of the law, which we think not to be the case, still they do not bring him within its *reason and spirit, and the mischief it was intended to remedy*. The proof is very meagre to show that this congregation was disturbed at all, and there is an entire absence of proof that the accused *wilfully disturbed* it. On the contrary, the proofs abundantly show that the accused and those with whom he acted were not only not actuated with a purpose wilfully to disturb the congregation, but that he and they were actuated by a pure and worthy motive in suspending the minister until grave charges against him could be inquired into by his official superior, the elder. We are not informed as to whether the steward's acts were clearly within the law of the church or not, nor is it material that we should make the inquiry. Enough is set out to show that the motive by which they were governed was rather to protect than to disturb the congregation, and entirely negatives the idea that they thought of any wilful disturbance.

The law, whilst it protects the objects of its regard, should with equal propriety protect those who are charged with the conduct of its members, and responsible to the proper authority for a faithful discharge of that duty; always bearing in mind that the law would not protect them in themselves violating the law of the land, which demands

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obedience from all, —as was the case in *Dorn v. The State*, 4 Texas Ct. App. 67.

We are of opinion that, agreeably to the evidence, the appellant is not shown to have violated the law, and does not come within the evils it was intended to provide against; and so believing, the judgment is reversed and the cause is remanded.

Reversed and remanded.

JOHN MCDANIEL v. THE STATE.

1. PRACTICE. — Questions of practice raised by an assignment of errors will not be passed upon by this court, unless the facts are verified by a bill of exceptions properly reserved at the trial.
2. EVIDENCE. — If the jury in a criminal action finds it impossible to reconcile a conflict of testimony, they are empowered to give credence to that which, in their opinion, is best entitled to it.
3. SAME — CASE STATED. — In a prosecution for the wilful and wanton killing of a dog, the defendant, a minor, offered in evidence the directions of his father as to what he should do if the dog was again caught in mischief upon the premises. *Held*, properly excluded; and that what the dog had previously done could not be shown in evidence to afford a legal excuse for the defendant to kill the dog at the time he did. And *held, further*, that the fact that defendant was a minor only proves that he was under the age of twenty-one, and the additional fact that he was directed by his father, with whom he was living, to kill the dog, without further evidence of defendant's age, is no defence for the wanton killing of the dog.
4. SAME. — The burden of proof, to show that the discretion of a minor defendant was sufficient to understand the nature and illegality of the act constituting the offence, does not devolve upon the State until it is shown that the minor was aged between the years of nine and thirteen.
5. MALICIOUS MISCHIEF. — A dog which has an owner is a "dumb animal," within the meaning of articles 2344 and 2345, Paschal's Digest.

APPEAL from the County Court of Jefferson. Tried below before the Hon. J. C. MILLIKEN, County Judge.

The opinion states the case. The penalty assessed by the jury was a fine of \$10.

Argument for the appellant.

O'Brien & Chenault, for the appellant. 1. If there be a radical error in the charge to the jury, exception thereto at the time is unnecessary; and if made ground for new trial, and overruled, the cause on appeal may be reversed. *Haynes v. The State*, 2 Texas Ct. App. 84; *Mitchell v. The State*, 2 Texas Ct. App. 404. The delivery of the law-book to the jury was, in effect, to leave to the jury the construction and application of the law, and was a *radical* error. Pasc. Dig., arts. 3058, 3060; *Prince v. Randolph*, 12 Texas, 295; *Ryan v. Jackson*, 11 Texas, 403.

2. Considered in connection with the evidence admitted, that the defendant was a boy, living with his father and under his control, and the circumstances attending the killing, as also admitted for the defence, the evidence excluded was relevant to show *knowledge* and *intent*, and whether or not the act charged to be an offence was *wilful* and *wanton*. Pasc. Dig., art. 2345; *Persons v. The State*, 3 Texas Ct. App. 244, and authorities there cited; *Branch v. The State*, 41 Texas, 622; *Benson v. The State*, 1 Texas Ct. App. 11. Apply to the facts of this case the last two authorities, as they define the offence, and illustrate the negative of wantonness, substituting a *dog* of mischievous habits (permitted by its owner to run at large, and against the incursions of which no fence is required by law) for the horse, and we respectfully submit that the relevancy of the said testimony is very apparent; and horses have, while dogs have not, an intrinsic value. 2 Chitty's Bla. Com., b. 4, marg. p. 236; *id.*, marg. p. 7, par. 21; 1 *id.*, b. 2, marg. p. 393.

Property in dogs is not absolute, but defeasible by the resumption of their ancient propensities to roam at large and depredate. *Id.*, marg. pp. 393, 394.

An action under the common law would only lie for *unlawfully* destroying them. *Id.*

It was not under the same law, nor is it now, unlawful, in

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a party injured, to abate them as a nuisance by destroying them — there being no remedy against their trespasses by distraint — when they encroach upon the premises and attack the person or property of the citizen. 2 id., b. 3, marg. p. 3, art. 1; marg. p. 5, par. 4, note 6; id., 6, 7, 8, par. 5.

In support of the assignments of error, in other respects, it may be said that the exclusion of said testimony, and the surrender of the law to the jury, by the court, was calculated to impress, and did impress, the minds of the jury *that the only question, the criterion of guilt*, was, “Did the defendant kill the dog?”

But, presuming everything else in favor of the verdict, the effect of the rulings of the court was to exclude *any* evidence as to the former depredations or habits of the dog in justification for killing him off the premises of the owner, and while he was trespassing on the premises of another. And whilst this construction of the law might have the effect to redeem and render less obnoxious dogs of the habits of “old dog Tray,” or his companions in Webster’s spelling-book, yet we respectfully submit that, for reasons too apparent, such a construction could not have been contemplated by the Legislature in the enactment of the statute under which this prosecution originated.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The information in this case is under article 2344, Pascal’s Digest. It charges that the defendant, on or about August 19, 1878, in the county of Jefferson, “did unlawfully, wilfully, and wantonly kill a certain dumb animal, namely, a dog, the property of another person; contrary to the statute in such cases made and provided, and against the peace and dignity of the State.”

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The first assignment of errors refers to the charge of the court, and is as follows, to wit:

“ 1. The court erred in delivering to the jury Paschal's Annotated Digest of the Laws of the State of Texas, in connection with a verbal charge, at the same time referring them particularly to articles 2344 and 2345, and in instructing and permitting them to take said law-book with them on their retirement, the parties having agreed only to a verbal charge.”

The question raised by this assignment should have been presented by bill of exceptions. The defendant, by himself or counsel, should have saved a bill of exceptions to the action of the court below which is complained of, so as to have brought the question properly before this court.

The evidence, both on the part of the prosecution and the defence, shows that defendant shot and killed a dog, the property of one Wilson Gainer. The witnesses introduced on the part of the State testified that the dog got after a rabbit in the field of Gainer, where his sons were at work; that the dog pursued the rabbit into the adjoining field of Zack McDaniel, and that the defendant there shot and killed the dog while he was after the rabbit. The witnesses on the part of the defence testified that they saw Gainer's dog come upon the premises of Zack McDaniel, go to a scaffold upon which he had meat drying, take a piece of meat therefrom, and that the defendant, who was then a boy living with his father, ran into the house, got the gun, and shot the dog while he was running off with the piece of meat. There was an irreconcilable conflict in the evidence offered on the part of the prosecution and the defence. The jury saw proper to believe the State's witnesses, and in this we cannot say that they committed an error.

We believe that the court properly sustained the exceptions to the evidence referred to in defendant's bill of excep-

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tions. The hearsay declarations of Zack McDaniel were not admissible in evidence as to the directions given by him to his son, the defendant, in case the same dog was caught in mischief upon the premises of Zack McDaniel.

What the dog had done before could not be shown in evidence as a defence, so as to afford a legal excuse for the defendant to kill the dog at the time he did. The fact that the defendant was a minor, and lived at the time with and was controlled by his father, would not shield him from punishment for wilfully and wantonly killing the dog. Our statute provides that "no person shall be convicted of any offence committed before he was of the age of nine years, nor of any offence committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offence." If the evidence had shown that defendant, at the time he killed the dog, was between the ages of nine and thirteen, the burden of proof would have been upon the State to have shown that he had discretion sufficient to understand the nature and illegality of the act constituting the offence. The fact that defendant was a minor only proves that he was under twenty-one years of age, and the further fact that he was living with his father, and that he was directed by his father to kill the dog, without further evidence in regard to defendant's age at the time, would not shield him from punishment for wilfully and wantonly killing Gainer's dog.

The court did not commit an error in overruling defendant's motion for new trial and in arrest of judgment. The information is a good one. It is made an offence by our statute to wilfully and wantonly kill a dog, as it is to kill any other dumb animal, the property of another. *Pasc. Dig.*, arts. 2344, 2345.

We find nothing in the entire record that would warrant us in reversing the judgment, and it is therefore affirmed.

Affirmed.

Statement of the case.

JAMES TRAFTON v. THE STATE.

1. THEFT—INDICTMENT for theft of property alleged to belong to a minor, charged that it was taken from the possession of "Mrs. J. H., the natural guardian" of the minor. *Held*, a sufficient allegation of the possession.
2. OWNERSHIP may be alleged either in one who has the general property, or in another who has a special property in the thing stolen.
3. PAYMENT for stolen property constitutes no atonement or defence; nor can it be treated as tantamount to such a voluntary return of the property as will, under the provisions of the Penal Code, mitigate the penalty.
4. CHARGE OF THE COURT.—In a trial for theft of a "yearling," the charge of the court designated the animal as "the calf described in the indictment." *Held*, an immaterial discrepancy, not calculated to mislead the jury, or otherwise to prejudice the accused.
5. EVIDENCE.—To establish the want of the owner's consent to the taking of the property, the prosecution need not introduce the testimony of the owner. Circumstantial evidence may suffice.

APPEAL from the District Court of Gonzales. Tried below before the Hon. E. LEWIS.

The conviction was for the theft of a yearling, and the punishment was assessed at two years in the penitentiary.

The testimony for the State proved the property in the animal as laid in the indictment. By two witnesses it was proved that, when approached because of branding the animal, the appellant claimed to have made a mistake, and offered three dollars in payment, which was accepted as satisfactory. Another witness for the State testified that, on a day previous to the disappearance of the animal, he was riding with the appellant through the woods, and they came upon the yearling following a certain cow. Appellant stated that the yearling was a pet of Sarah Hutchinson, and that, as the Hutchinsons had no other stock, he believed he would put his own brand on it and keep it. Witness replied that he had better not do it while he was present, for he would lodge an information against him. A day or two afterwards, witness saw appellant driving the cow and yearling towards his (the appellant's) house, and was told after-

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wards, by the appellant, that he had that day made a dollar and a half and a calf; to which the witness responded, "I see you have."

For the defence, one witness testified that he knew appellant had three or four marked, but unbranded, yearlings at the time of the alleged theft, one of which was of a color and size answering the description in the indictment. Witness told the appellant of these yearlings, and branded three for him.

It was not in evidence that appellant offered to return the animal to the owner.

Ponton & Fry, for the appellant. In this cause the defendant is indicted for theft of a yearling of the species of neat cattle, the property of one Sarah Hutchinson, a minor, from the possession of Judith Hutchinson, the mother and natural guardian of said Sarah.

In our second assignment of error, we claim that the court erred, because we know of no law or rule of practice which would authorize the court to go outside of the indictment, where a defendant was charged with theft of an animal described as a yearling, and charge in relation to theft of a calf. Defendant, under the allegations in the indictment, could only be convicted for theft of a yearling, while the court, by his charges, authorize the jury to convict for theft of a calf, thereby virtually depriving the defendant of a legal right, which is that he should only be tried upon the allegations set forth in the indictment.

In support of our third assignment of error, we take it as a well-settled legal proposition that the natural guardian, — as, father or mother, — and as such, has no legal right to the management and control of the separate estate of the infant.

The instructions given in fifth charge must be erroneous, and our assignment of error good.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. This is an appeal from the judgment convicting the appellant of theft of "one certain yearling, of the species of neat cattle," alleged to have been wilfully, unlawfully, fraudulently, and feloniously taken "away from the possession of Mrs. Judith Hutchinson, natural guardian of Sarah Hutchinson, a minor," and averred to be the property of said Sarah Hutchinson, and of the value of \$5, and taken "without the consent of said witness Hutchinson, or the consent of Sarah Hutchinson, the said owner thereof," with the unlawful, fraudulent, and felonious intent, etc.

The following exceptions were taken to the indictment:

"1. The allegations in the indictment are vague and uncertain, and not such as to compel the defendant to answer.

"2. There is no offence charged in the indictment, known to the laws of Texas; wherefore defendant moves to quash it."

This motion was overruled, and the accused was tried on the plea of not guilty, and found guilty by the jury, and his punishment assessed at two years' confinement in the State penitentiary.

The accused made a motion and an amended motion for a new trial, which were overruled, and judgment was entered upon the verdict; from which judgment this appeal is prosecuted. A bill of exceptions was saved to the rulings of the court refusing to give to the jury special instructions asked by the defendant's counsel, and refusing a new trial. It is proposed to notice only such matters arising on the charges given and those refused, and such set out in the motion for a new trial, as are deemed necessary to a proper decision as to the merits of this appeal, rather than a discussion *seriatim* of the assignment of errors.

The objections to the indictment, taken in the motion to quash, are general in their character, and do not point the

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court to any particular defect. Testing the indictment by the requirements of the Code, and repeated decisions of both the Supreme Court and of this court, it is deemed amply sufficient and certain to require the accused to plead to it, and to charge the offence therein set out. The court did not err in overruling the motion to quash. *Henry v. The State*, 45 Texas, 84; *Robertson v. The State*, 1 Texas Ct. App. 311; *Grant v. The State*, 1 Texas Ct. App. 1

The following special instructions were asked: "If the jury believe from the evidence that the State has failed to prove ownership and title to the yearling as alleged in the indictment, or if from the evidence they have a reasonable doubt of the true ownership of said yearling at the time it is alleged to have been taken, they will acquit. 2. It devolves upon the State to prove want of consent, as alleged in the indictment, before a conviction can be had. 3. If property stolen is returned within a reasonable time, and before prosecution is instituted, the penalty is reduced to a fine not to exceed one thousand dollars."

The judge, in refusing to give these instructions, appends thereto the following, as explanatory of his action: "Having instructed the jury as to the law applicable to the facts of the case, and because there was no evidence of the *return* of the yearling, but merely that the defendant paid the value of the calf after he was approached on the subject of the taking by Hutchinson, I decline to give the foregoing."

As abstract propositions, at least a portion of these special instructions announced correct law; but whether they were applicable to this particular case, or not, is quite a different question. An examination of the general charge, in connection with the testimony as set out in the statement of facts, discloses that the reasons given by the judge for refusing the special instructions are sustained by the record, and that he did not err in refusing to give them to the jury.

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As to proof of ownership as averred in the indictment, the rule, well settled, is, as was said by Mr. Justice Wheeler in *Langford v. The State*, 8 Texas, 115: "The rule is, that when one person has the general, and another the special property in the thing, the property may be averred in either." *Moseley v. The State*, 42 Texas, 78; *Henry v. The State*, 45 Texas, 84; *Wilson v. The State*, 3 Texas Ct. App. 206; *Samora v. The State*, 4 Texas Ct. App. 508; Pasc. Dig., arts. 2386, 2387. It was competent to aver the ownership of the property in either the mother or the daughter; and so, with regard to the proof, if the facts showed that either was the true owner, there would be no variance between the averment and the proof. The statement of facts discloses that after the brother of the owner had gone in search of the missing animal, and found it near the residence of the accused, and had charged him with having branded it, the accused paid him (the brother) for it, and he conveyed the money to the mother, who gave it to the minor; but these facts did not warrant a charge on the subject of a voluntary return of the stolen property, nor did they atone to the violated law, if indeed he had committed a theft in the first place. *Horseman v. The State*, 43 Texas, 353; *Shultz v. The State*, decided at the present term, *ante*, p. 390. There was, however, no evidence of a return of the property.

It appeared in evidence that when the accused was accosted on the subject of branding the yearling, he said it was a mistake; and a witness for the defendant was introduced, apparently, in support of this theory. On this branch of the defence the court gave the following charge: "If the jury believe from the evidence that the defendant, James Trafton, took the calf described in the indictment under an honest mistake, honestly believing that said calf belonged to him, then they should acquit him."

By this instruction, the question of mistake was properly submitted to the jury, under and in connection with a proper

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charge on the subject of the credibility of the witnesses. It is argued, for the appellant, that the charge was prejudicial to the rights of the accused, in that it warranted the jury in convicting on proof of theft of either a calf or a yearling. The charge is not liable to this construction. When a calf is mentioned, it is referred to as the one mentioned in the indictment, and could not have misled the jury. The proof showed that the animal was taken from the possession of Mrs. Hutchinson, the mother of the owner, who was under the control of her mother. Under this state of case, the State was not required to bring the child into court in order to prove that she had not given her consent to the taking. The court properly charged the jury that the taking and want of consent might be proved by circumstantial evidence.

We are of opinion the appellant has been fairly tried and ably defended; that there is no want of sufficiency or certainty in the indictment; that the question of the guilt or innocence of the accused was fairly submitted to the jury by the charge of the court; and that the evidence is sufficient to support the verdict of the jury.

Finding no material error in the proceedings, the judgment is affirmed.

Affirmed.

GEORGE WILLIAMSON v. THE STATE.

1. **VARIANCE.** — In this case, the affidavit fixes the commission of the offence on the 7th day of May, 1877, while the information fixes it on the 1st day of May, 1877. *Held*, that the variance is fatal.
2. **AGGRAVATED ASSAULT — INFORMATION.** — An information for aggravated assault must charge the offence as such, and must set forth also the circumstances constituting the aggravation.
3. **SAME — CASE STATED.** — In a prosecution for an aggravated assault, though the information charges it as such, and that it was committed with firearms within carrying distance, it fails to allege either that "serious bodily

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injury was inflicted by the use of the fire-arms," or that the fire-arms were "deadly weapons, and used under circumstances not amounting to an intent to murder or maim," or that the assault was committed "with pre-meditated design, and by the use of means calculated to inflict great bodily injury." *Held*, that one of these allegations, in addition to the general charge of aggravated assault, is essential to make the information a good one to charge aggravated assault.

APPEAL from the County Court of Gonzales. Tried below before the Hon. J. S. CONWAY, County Judge.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Two of the grounds relied upon for a reversal of this case are, we think, well taken.

"1. That there is a fatal variance between the time of the commission of the offence as laid in the information, and that as stated in the affidavit.

"2. That the information does not charge an aggravated assault, and consequently will not support a verdict and judgment for that offence."

1. Prosecutions commenced by information are required to be based upon the affidavit of some credible person. Acts Fifteenth Legislature, 20, sec. 8. This affidavit is the predicate for and the fundamental part of the procedure, and the information must correspond with and be characterized by the offence as stated in the affidavit. *Davis v. The State*, 2 Texas Ct. App. 184; *Thornberry v. The State*, 3 Texas Ct. App. 36; *Turner v. The State*, 3 Texas Ct. App. 551. The case of *Hoerr v. The State*, 4 Texas Ct. App. 75, is directly in point, and there it was substantially held that a discrepancy between the information and affidavit as to the date of the alleged offence was a fatal variance. In the case we are considering, the date of the offence as fixed by the affidavit is May 7, 1877, whilst that fixed by the information is May 1, 1877.

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2. The information does not charge an aggravated assault. It is a familiar rule of criminal practice that, "where a peculiar or aggravated punishment is to be inflicted, the peculiar or aggravated matter constituting the offence is required to be set out in the indictment." *Browning v. The State*, 2 Texas Ct. App. 47; 1 Bishop's Cr. Proc., 2d ed., secs. 82, 84, 598.

There are nine separate, distinct, and specific grounds enumerated in the statute, any one of which would make the offence an aggravated assault and battery, and some one of which must be alleged, to render an indictment or information good and valid as a charge for that offence. Pasc. Dig., art. 2150; *Kouns v. The State*, 3 Texas Ct. App. 13. "An indictment for an aggravated assault should charge the offence as such, setting forth also the circumstances constituting the aggravation." *The State v. Pierce*, 26 Texas, 114; *Pinson v. The State*, 23 Texas, 579.

The information, it is true, charges that the assault was an aggravated one, and one committed by the use of fire-arms, and within carrying distance; but it nowhere alleges either that "serious bodily injury was inflicted (by the use of said fire-arms) upon the person assaulted," nor that the "fire-arms" were "deadly weapons," and used "under circumstances not amounting to an intent to murder or maim," nor "that the assault was committed with premeditated design, and by the use of means (fire-arms) calculated to inflict great bodily injury." Pasc. Dig., art. 2150. It would take one of these allegations, additional to that contained in the information, to make it good for an aggravated assault.

For either and both of the reasons above stated, the court should have sustained defendant's motion in arrest of judgment; and because of error committed in overruling it, the judgment below is reversed and the cause remanded.

Reversed and remanded.

FAYETTE HICKS v. THE STATE.

JURY-LAW.— When it appears from the record that the oath prescribed by the statute (Gen. Laws Fifteenth Legislature, 80), directing the manner of summoning jurors, was not administered to the sheriff, or his deputies acting under him, a conviction will be reversed.

APPEAL from the County Court of Lavaca. Tried below before the Hon. T. A. HESTER, County Judge.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. In the twelfth section of “An act to regulate grand juries, and juries in civil and criminal cases in the courts in the State” (Gen. Laws Fifteenth Legislature, 80), it is expressly provided that, “at the commencement of each term of the court at which jury cases may be tried, the judge shall administer to the sheriff and his deputies the following oath: ‘You do swear that, without favor or affection, or without purpose to favor or injure the rights of any litigant, or of the State, or of any defendant, you will summon jurors in and for this county; and that, to the best of your skill and judgment, you will select discreet, sensible, impartial men, when required to summon jurors not selected by the jury commissioners; and that you will not, directly or indirectly, communicate or converse with any jurymen, touching the subject-matter of any case pending for trial at the time; that you will not, by any means, attempt to influence, advise, or control a jurymen in his opinion in any case under trial.’ ”

A court would have as much right to ignore and disregard any other section of the law as this. In the estimation of our law-givers, it seems to have been considered one of the safeguards for the protection of personal right and lib-

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erty, and one of the essentials to the impartiality of jury trials, that this oath should be taken as an additional qualification for such official action. No additional oath than the ordinary one of office is required of the sheriff and his deputies, as a prerequisite to any other official duty imposed upon them by law, so far as we now remember. This fact alone should be sufficient to establish of how much importance it was considered in this particular by those responsible for and engaged in the passage of the law. As was said by this court in *Shackleford v. The State*, 2 Texas Ct. App. 385, "when the Legislature prescribes rules for the selection of juries, and repeals all laws and parts of laws in conflict with the act (to which we have referred), the court must observe the law in force."

In the case at bar, the county judge certifies a bill of exceptions reserved by defendant at the proper time on the trial, to the effect that he did not administer, nor require the officer who summoned the jury to take, nor did he take, the statutory oath above quoted. Because such oath was not administered to the officer, this court reverses the judgment rendered, and remands the case to the lower court for a new trial.

Reversed and remanded.

M. J. FARRAR v. THE STATE.

JOHN PRIOR v. THE STATE.

1. CONTINUANCE. — When all the requirements of the statute have been complied with, a first continuance is a matter of right.
2. PRACTICE IN THIS COURT. — The attorney-general suggests that the records in these cases do not show that the attachments issued for the defendant's witnesses were based upon proper affidavits. In the absence of anything showing the contrary, this court will presume the clerk acted upon proper authority, and will not inquire into the proceedings behind the attachments.

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APPEALS from the District Court of Austin. Tried below before the Hon. L. W. MOORE.

The defendants were separately indicted and tried as principals in the commission of the same offence. Both were convicted, and the punishment in each case assessed at four years in the penitentiary, at hard labor.

J. P. Bell, for the appellants.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellants in these cases were separately indicted, tried, and convicted in the District Court, for the theft of a beef steer, averred to be the property of one C. J. Habermacher; and after motions for new trial were overruled, each party has appealed to this court. The two cases appear to be but different parts of one transaction, involving separately the participation of each of the appellants. The nature and result of the two cases and the questions presented in the court below are so similar, that the determining of one will dispose of the other, so far as these appeals are concerned.

It is proposed to consider but one question, which arises in both cases, and embraces substantially the same features, namely, the refusal of the court below to grant to each defendant a continuance.

The grounds of the applications are in substance the same, to wit, the inability to go safely to trial on account of several absent witnesses, — giving their names and places of residence, the diligence used to procure their attendance, and what it is expected to prove by them, with the other formal parts of an affidavit for a first continuance. The most material difference is, that in Prior's case the diligence set out is not so full and satisfactory as in the other, and

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that in Prior's case a counter-affidavit is made in opposition to the application to continue.

We are of opinion that the grounds set out in the application were sufficient as a first application, under the circumstances surrounding these parties at the time. The refusal to continue was excepted to, and the ruling in each case saved by a bill of exceptions, and also entered into the motion for a new trial. When a defendant seeks a continuance of a criminal case on account of the absence of witnesses, the law requires that, to entitle him to it, he must do certain things. These requirements are set out in article 581 of the Code of Criminal Procedure (Pasc. Dig., art. 2487). It has frequently been held that when the requirements of the law have been complied with, a first application should be granted as a matter of right. *Swofford v. The State*, 3 Texas Ct. App. 76, and cases there cited.

We deem it only necessary to say, in response to the suggestion of the assistant attorney-general that the attachments for the defendant's witnesses are not shown to have been based upon proper affidavits, that the attachments having issued, we must presume, in the absence of any thing appearing in the record to the contrary, that the clerk acted upon proper authority in issuing them; and that, in the present state of the record (if, indeed, in any case), we would not feel warranted in inquiring into the proceedings behind the attachments.

Because of error in refusing the application for a continuance, the judgment in each of these cases is reversed, and these cases are remanded.

Reversed and remanded.

JOHN MCGEE v. THE STATE.

1. CHARGE OF THE COURT — CASE STATED. — The information charged an assault with a "deadly weapon, to wit, a wagon-box, and did then and there inflict serious bodily injury with said wagon-box." The court charged, not only as to the circumstances of aggravation mentioned in the information, but also that an assault becomes aggravated when committed with premeditated design, and by the use of means calculated to inflict great bodily injury. *Held*, error, as the information did not charge premeditated design and the use of means calculated to inflict great bodily harm.
2. SAME. — It was error to refuse the charge asked, "that the defendant being charged with assault with a wagon-box, he cannot be convicted on proof of an assault with a pick, drill, or anything else."

APPEAL from the County Court of Lavaca. Tried below before the Hon. T. A. HESTER.

The opinion states the case.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The information in this case charges that defendant did make an aggravated assault upon one William McCauley, with a deadly weapon, to wit, a wagon-box, and did then and there inflict serious bodily injury upon him with said wagon-box.

The evidence in the statement of facts shows, substantially, that defendant commenced a quarrel with McCauley, who tried to avoid a difficulty. Defendant finally slapped McCauley with his hand. McCauley, with a piece of iron with which he was lighting his pipe in the blacksmith-shop, punched defendant off. McCauley left the shop and went into the yard, and defendant then threw an iron drill at McCauley. Defendant then threw a pick at McCauley, who dodged it, and seized the pick and advanced

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with it upon defendant, who got hold of a wagon-box. McCauley then dropped the pick, and started to run. The defendant then threw the wagon-box at McCauley, and struck him with it a severe blow. The defendant then attempted to strike with a rock, but was prevented.

The court charged the jury, not only as to the circumstances of aggravation mentioned in the information, but also instructed them that an assault became aggravated when committed with premeditated design, and by the use of means calculated to inflict great bodily injury; which last instruction was improper. The information did not charge that the assault was made with premeditated design, and by the use of means calculated to inflict great bodily injury. The charge of the court was excepted to by the defendant, at the time. *Kouns v. The State*, 3 Texas Ct. App. 13.

We believe that the court ought to have given the first special instruction asked by the defendant, which is as follows, to wit: "That the defendant is charged with having committed an assault with a wagon-box, and that the defendant cannot be convicted by proof of an assault with a pick, a drill, or anything else." This charge the court refused to give.

For these errors, the judgment of the County Court is reversed and the cause remanded.

Reversed and remanded.

DICK COX v. THE STATE.

1. MURDER. — All murder committed with express malice is murder of the first degree, and all murder not of the first degree is murder of the second degree.
2. SAME — EXPRESS MALICE. — Express malice exists when the killing is done with a sedate, deliberate mind, and with a formed design to kill; which formed design is evidenced by external circumstances discovering

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that inward intention, — as, lying in wait, antecedent menaces, former grudges, and concerted schemes to do bodily harm. The killing must be with a cool, composed mind, in pursuance of a formed design to kill, or to inflict serious bodily harm which would probably end in the taking of the life of the person killed, and in the absence of circumstances which would reduce the offence to negligent homicide, or manslaughter, or which would excuse or justify the homicide.

8. EVIDENCE. — Note a state of proof held not sufficient to sustain a conviction for murder in the first degree.

APPEAL from the District Court of Walker. Tried below before the Hon W. D. Wood.

The indictment charged the appellant with the murder of P. W. Randolph, on February 8, 1878.

The State first introduced James Randolph, a cousin of the deceased, who testified that himself, his brother John, and one Bob Wiley were present at the mill of witness's father, in Walker County, when the killing occurred. Wiley was in or about the mill, and witness, his brother John, and the deceased were lying on the ground, whittling with their pocket-knives, when the appellant came up behind them and said they ought to pay him for the turkey which the dogs of the party had killed. Deceased replied, "Our dogs did not kill your turkey; it was my dog that did it." Appellant said that he was in the habit of killing dogs that killed his turkeys, and that if he was not paid for this turkey, somebody's dog would come up missing. Deceased then said, "If you kill my dog, you had better hunt your hole." When the deceased said this, appellant came around by witness, drawing his knife, — a pocket-knife with a blade about the length of witness's finger, — holding it with the blade to the back of his hand, and stopped in front of deceased, a step or two distant. He appeared to be very angry, and said, "G—d d—n it, I will tell you I am a man, and won't be run over by any set of men." Witness then got up, and asked appellant what he meant by cursing and cut-

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ting up so. Witness's brother John then told appellant to go away ; but he did not go. Deceased then got up from the ground and pushed the appellant with his left hand, holding his pocket-knife in his right hand, down by his side, which knife had both end-blades open, and which were broken off and blunt, — the third of each blade broken off. Deceased did not hold the knife in a threatening attitude ; did not strike with it, or attempt to, or do more than push appellant with his left hand. Appellant then cut and stabbed deceased in the right breast, striking one lick. Deceased said he was killed. Appellant, at the time, held the knife at about right angles to his body, his arm being drawn forward in a striking attitude. The blood spurted out from the wound, and deceased died in about two hours. The appellant's knife was drawn and presented in a threatening attitude when deceased got up. Appellant left, after the stabbing, and was afterwards arrested in Leon County. The deceased, when he got up, did not appear angry, nor did he speak in an angry manner when he told appellant he would have to hunt his hole if he killed his (deceased's) dog. Appellant did not retreat or give back during the difficulty. The witness was present some three weeks before, when deceased's dog killed or injured the appellant's turkey. They were driving stock by appellant's house, when the dog got after the turkey and crippled or killed it. Deceased whipped the dog, and tried to pull him off from the turkey. During the conversation on the evening of the killing, appellant said he ate the turkey ; and deceased, after telling him that he whipped the dog at the time, and tried to keep him from injuring the turkey, said he did not think, since appellant had eaten the turkey, that he (deceased) ought to pay for it.

On cross-examination, witness said that both appellant and deceased cursed a good deal. Witness's brother John called to witness, and told him to come away or go away,

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and have nothing to do with the difficulty. Wiley was in the mill during the occurrences narrated. Witness, when he got up from the ground, had his knife in his hand. Deceased did not strike appellant, but pushed him with his left hand, when appellant stabbed him.

John Randolph testified, for the State, that he was present at the killing. Some three weeks previous, himself, James Randolph, and deceased were driving stock past the house of the appellant, when deceased's dog ran after appellant's turkey, and either killed or crippled it. Deceased whipped the dog, and tried to pull him off the turkey. On the evening of the killing, the same three were lounging on the ground in front of the mill, where they all worked, whittling with their knives,—two blades of the knife of deceased opened at either end of the handle, and about one-third of each was broken off. Appellant came up behind them, and said their dogs had killed his turkey and he ought to be paid for it. Deceased said, "Don't say 'we;' it was *my* dog that did it." Appellant said he was in the habit of killing dogs that killed his turkeys. Deceased answered that he had beaten his dog and tried to keep him off the turkey. Appellant answered, "As it was your dog, I reckon I'll have to let him off," and turned away. Deceased said, "I reckon you will have to let him off;" and appellant turned back and said, "If I don't get pay for my turkey, somebody's dog will come up missing;" to which the deceased answered, "You kill my dog, and you had better hunt your hole." Appellant then cursed, and said, "By G—d, gentlemen, I'll let you know I am a man," and came back from behind; when witness's brother James got up, and appellant drew his knife, opened it, and took position about two steps in front of deceased. Witness's brother James then asked, "What do you mean, cursing and cutting up so?" Witness then told appellant to go away. Deceased then got up, with his knife in his right hand, which hung down by his

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side. Witness went between the parties, and again told appellant to go away. Witness then passed on, and did not see the cutting. Saw that deceased had been stabbed, and heard him say that he was killed. Appellant was not employed at the mill, and had no business there.

On cross-examination, witness did not remember that he told his brother James to go away, or called him away, but might have done so. Deceased may have advanced towards appellant two steps, but witness is not positive. Did not see the deceased either strike or push the appellant. Bob Wiley was present. Appellant worked in witness's father's shop, about one hundred yards from the mill. Both appellant and deceased cursed each other.

Phelan Randolph, for the State, testified that at the time of the killing, appellant was working at Mr. Clinton Randolph's shop, near the mill. Witness, from what appellant had previously said to him, judged that he was very much displeased about the killing of his turkey, and seemed to think that he ought to have been paid for it. He had been working at the shop for about twelve months before the stabbing,

Bob Wiley, for the defendant, testified that at the time of the killing he was in the mill of Mr. Clinton Randolph, and from there saw a part of the difficulty. The hands had just quit work, but witness was getting extra pay to keep up a fire under the boiler. Deceased, James and John Randolph were lying on the ground near the mill, with their knives out, whittling. Appellant, who had been working at the shop, came by the mill and lit his pipe at the furnace, which he was in the habit of doing every evening after the day's work was over. He lived about one mile from the mill and workshop. After lighting his pipe, he went up to where deceased and the others were lying on the ground, and entered into a conversation with them. Witness did not hear any more of the talk before the difficulty than that the

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appellant said he "ought to be paid for it." After some further conversation, witness heard appellant say, "As this is your dog, I will let you off;" to which the deceased responded, "You will have to." Appellant then said "somebody's dog might come up missing," and turned off. Deceased then said, "If you kill my dog, G—d d—n you, you will have to hunt your hole." Appellant then turned round and said, "Gentlemen, what I first said was in a joke; but, by G—d, I can let you know I am a man." James Randolph then got up, with his knife in his hand, and asked appellant what he wanted. Appellant then pulled out his knife and opened it. Deceased then got up and said, "You d—d black son of a b—h, do you draw your knife on me?" and advanced towards appellant with his knife in his hand. John Randolph called to his brother to have nothing to do with it. Witness did not see the killing, but saw appellant giving back. Deceased advanced on appellant, with his knife drawn, some twelve or fifteen feet. Saw deceased after he was cut. He went into the mill, and sent for his uncle, Clinton Randolph. Witness was then and is now in the employ of Clinton Randolph, at the mill.

On cross-examination, witness states that the reason he says it was twelve or fifteen feet that deceased advanced, is because it is that distance from where the difficulty first commenced to where the deceased was when he said he was killed. Appellant then picked up his hat and went off. Don't know that he went home; knows that he ran off, as he was arrested in Leon County; has not seen appellant since the difficulty until in court, at the time of the trial. Witness never told Phelan Randolph that he did not see the difficulty, and knew nothing about it; but did tell him that he did not see the killing. Has talked to no one about this affair until with Capt. Hightower (defendant's attorney), this morning. No one of the parties attempted to use his knife or cut the appellant, so far as witness knows. When

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James Randolph got up, he did not advance on appellant, nor attempt to use his knife, but appellant did back off and open his knife.

It is deducible from the testimony that the appellant is a negro. The jury found him guilty of murder in the first degree.

L. B. Hightower and J. R. Burnett, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was indicted for the offence of murder, charged to have been committed with express malice, and on the trial thereof was convicted of murder in the first degree, and adjudged to be executed. A motion was made for new trial, which was overruled; to which ruling the defendant excepted, and gave notice of appeal to this court.

The main question to be decided in this case is this: Does the evidence in the record make out a case of murder committed with express malice? In this State, all murder committed with express malice is murder in the first degree, and all murder not of the first degree is murder in the second degree.

“Express malice is where one with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention,—as, lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.” 4 Bla. Com. 198.

Where one man, with a cool, composed mind, in pursuance of a formed design to kill another, or to inflict upon him some serious bodily harm which would probably end in depriving him of life, does kill such person, in the absence of the circumstances which reduce the offence to negligent

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homicide or manslaughter, or which excuse or justify the homicide, such killing would be a murder committed with express malice. In looking through the evidence in the record, we are not satisfied that it makes out a case of murder in the first degree under the law.

Because the verdict is against the weight of the evidence, the judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

EX PARTE STEPHEN A. MCKINNEY.

HABEAS CORPUS. — Following the rule heretofore laid down in applications for *habeas corpus*, this court refrains from comment on the testimony upon which bail was refused below, and simply affirms the order of the court in the present case.

APPEAL from the District Court of Travis. Tried below before the Hon. E. B. TURNER.

The charge was the murder of Gus Porter, on November 15, 1878, and the appeal is from the refusal of the court below to admit the appellant to bail.

It appears from the evidence that, some nights before the killing, the deceased had an altercation, in an alley in the rear of the house of deceased's mother, with a party having no connection with this case, at which appellant and one Bailey, jointly indicted with this defendant, were present, and siding evidently against the deceased. The mother of deceased appeared on the scene, and induced the boys engaged in the controversy to "make friends." Subsequently, deceased received a postal-card through the post-office, signed with the initials of Bailey, in which very severe epithets were used.

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This testimony shows that on the evening of the killing, before dark, the two implicated boys hired horses at a livery-stable, stating that, if used for a longer time than hired for, the extra pay would be forthcoming. Other testimony shows that the appellant and Bailey inquired for deceased at a bar-room and at a house of prostitution, before the killing, and that Bailey, after procuring arms from deceased at one of the houses, remarked to some of the inmates that he would return and treat them later in the night, if he was not killed, or did not kill some one himself and have to jump the town. To one he spoke of his intention to whip deceased, and answered "No" to the inquiry, "Can't you whip him fair?" It is further shown that appellant and Bailey were twice at the house of Franklin, before the killing, and Bailey was heard to say, "If there are officers here, we won't do anything, but will kill deceased before morning."

Deceased, it appears, starting up town with some of his companions, heard or saw appellant and Bailey coming out of the house last spoken of, and directed his friends to await him a few steps up the alley, as he wanted to see Bailey about calling him a s—n of a b—h. It is stated also that about this time, or a little before seeing the parties, deceased went into the house, and returning shortly, told his associates that they (meaning appellant and Bailey) were fixed for him, and he would see them and settle it. Deceased then, it is testified, stepped five or six feet into the alley through which the appellant and Bailey were approaching their horses, tethered near by, and called to Bailey, and asked, "Bailey, did you call me a s—n of a b—h?" Appellant then, it is testified, ordered deceased to throw up his hands, and deceased threw up one hand, and said, "Hold on, I have no fuss with you;" whereupon appellant answered, "Hold up both hands, or, G—d d—n you, I will kill you," and immediately fired; and deceased fell to his knees and

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commenced firing, Bailey exclaiming, "Don't shoot me; I have done you no harm." Bailey mounted his horse, and several shots were fired by the parties.

The witnesses generally could not tell which hand was held up by the deceased, — the right hand it is confidently asserted by some, the left by others; but this testimony as to which hand is generally impression.

There is some apparent conflict in other parts of the testimony. The first declaration of the deceased, after the shooting, was made in the presence of several. According to one witness, it was to the effect that on his way up town, with others, he met the appellant and Bailey, when appellant ordered him to throw up his hands, etc.; but that deceased did not say or indicate which hand he threw up. Another witness who was present says that he did say then, and to witness several times subsequently, that he threw up his *right* hand.

Again, it is testified by one witness that when the shooting commenced another witness said, "They are after Gussie;" which was discredited by the witness swearing, until the other witness persisted in this, asserting that she believed it because "they" had been "following Gussie for two or three days." This other witness said that she told her that she believed it because of what she had heard appellant say, — "that if the officers were about, they would do nothing then, but would kill deceased before morning."

The testimony of various witnesses is introduced to prove that deceased was not in the habit of carrying arms, and was never known to have carried arms before that night. None of the witnesses know when or where he armed himself that night. Testimony is also offered to prove the declaration of appellant, on a night previous to the killing, that he always went armed.

This is about the substance of the testimony gleaned from a great number of witnesses. It should be added that,

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according to the evidence of one witness, Bailey's expression, "Don't shoot me," etc., was made just before McKinney fired the first shot, and not at a subsequent stage of the *rencontre*, as stated by other witnesses. It was also in proof that the appellant, after absenting himself for a time, returned and surrendered himself voluntarily; and that he was eighteen years of age in June, 1878. The deceased was twenty years old, and it may be inferred that Gentry Bailey and the eye-witnesses of the *rencontre* were also youths.

Space is given for a large part of the lucid and forcible argument filed for the appellant, not only in consideration of its intrinsic merits, but because of the light which, in connection with the evidence, it reflects upon the practice in appeals of the present character.

Walton, Green & Hill, for the appellant. McKinney, the applicant for bail, was and is charged by indictment with the murder of Gus Porter, on November 15, 1878. The indictment is joint against McKinney and one Gentry Bailey, but only the first is under arrest, and alone applies for bail.

On the hearing, the judge refused bail, remanding applicant to jail.

It will be observed that, in order to obtain the semblance of express malice, a drag-net was thrown out and the pur-lieus of the city raked to get what might be loose and boyish expressions, dropped at random, purposeless, and without direct or practical effect, and devoid at the same time of any intent to presently do an unlawful thing, much less to take human life, either of a particular person, or, indeed, of any person.

It will be further observed, by a candid perusal of all the evidence, that the *rencontre* was evidently not only accidental, but wholly unexpected to the appellant, and that

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the killing ensued from the then present exigencies, and not in pursuance of a plan, or threats, antecedent malice, former grudges, or, indeed, from any other cause than those which arose on the instant.

Many of the witnesses contradicted one another in such material matters that the discrepancies or contradictions cannot be credited to the usual differences that occur where truthful witnesses give an account of a transaction seen from different stand-points, and with different opportunities to observe. Here the differences originate, very evidently, not from differences in sight, hearing, or opportunities, but are the emanations of the heart. Those who desired to see and hear most that would bear the appellant down, saw and heard most,—not that it occurred, but because they desired it should occur. They could not make their testimony flagrantly false, because detection would ensue; but they play the role of slanderers, who whisper in the dark of the evening; they give a sign, but in such a way as to enable them to deny the meaning that may be attached to it. Pimps, companions of dissolute women, ignorant negroes who receive their employment at and about bawdy-houses, unite to crush a citizen. Their tales, though broken and weakly told, are yet earnest of their faith to the compact; and while their testimony is incredible, yet to dismember it requires the application, not only of good common sense, but also of a will and nerve to apply it.

We will point out some of the discrepancies, nay, contradictions, which exist in the testimony of those who had equal opportunities to see, hear, and observe.

1. Dr. Cummings says he heard the dying statement of Porter; that Porter did not say in words, nor indicate by signs, which hand he threw up when McKinney demanded that motion.

2. Mrs. Porter, the mother, says Porter told the same tale about the shooting, all the time,—the same he first told

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to Dr. Cummings ; that he threw up his *right* hand, — that she knew he said he threw up his right hand.

3. Miss Franklin said, as they (McKinney and Bailey) passed her door, Mrs. Porter was sitting with her. She heard one of these boys say : “ *If there were any officers there, they would not do nothing, but they would find Gus Porter before morning and kill him.* ” Further on, she says : “ When I heard the shot, I was frightened, and said to Miss Mollie (Mrs. Porter, mother of deceased), ‘ They are after Gussie.’ * * * I then told her what I heard Bailey and McKinney say a short time before. ”

Mrs. Porter, giving an account of the same conversation between her and Miss Franklin, says : “ I heard the shooting ; at the sound of the first shot, Katie said to me, ‘ They are after Gussie.’ I said ‘ No, I told him to go to bed ; ’ but she persisted in saying ‘ They are after Gussie,’ and I asked her why she said so, and she replied, ‘ *Because Bailey and McKinney have been following him about for two or three days.* ’ ”

Again, the contradiction is about as radical between Sophia Davis and Lucy Patterson. Davis says : “ Bailey said * * * he was going to whip Gus Porter. I asked him if he could not whip him fair. * * * Said he was going to fix Gus Porter. ”

Miss Patterson, giving an account of what occurred at the same time, is positive that no such conversation took place, and that Sophia Davis was not in the room at all.

The testimony of two other witnesses was taken to shadow threats, viz., John Robinson and Joseph Davis. The first of these fails to cast the wanted shadow ; while the other discredits himself, and gives only a conditional threat.

We think we may safely say that this court will determine the degree of guilt of appellant by the facts and circumstances surrounding the shooting, freed from any constructive malice attempted to be foisted into this case

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through threats or antecedent grudges. The truth is, as taught by the facts, that there was no difference, malignant nor of other character, between appellant and deceased. The only anger ever shown between them was in the rear of the house, a few nights before the shooting, and this cause of difference was pacified and the boys made friends. After that pacification, there does not appear to have been any hard feeling manifested towards the deceased by McKinney; indeed, there did not appear to be any cause for hard feeling, malice, or grudge between them. So, we repeat, we think we may rest this case on the facts, the *res gestæ* of the shooting; but if such be not the case, and the court shall consider that the testimony establishes threats, and that such threats constitute, or tend to constitute, express malice in the mind of appellant towards the deceased, then we say that the law is, that if the killing take place under the influence of causes arising at the time the wound is given, the killing will be taken as the result of the causes arising at that time. Perhaps we should state this proposition more accurately, as laid down by authority: "That if fresh provocation intervene between preconceived malice and death, it will not be presumed that the killing was upon the antecedent malice." *McCoy v. The State*, 25 Texas, 43.

I. 1. The present Constitution of the State contains a material modification from that of 1845, on the subject of bail. The modification is a step of progress in behalf of human liberty. Const. 1845 (Pasc. Dig. 48), art. 1, sec. 8; Const. 1876, art. 1, sec. 11.

The modification consists in the latter Constitution leaving out the words, "*or presumption great.*" Our present Constitution is in these terms: "All persons shall be bailable by sufficient security, unless for capital offences when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found, upon

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examination of the evidence in such manner as prescribed by law.”

2. Murder, to be murder with express malice, must be killing resultant from the formed design of a sedate and deliberate mind to kill the deceased, or to inflict on him by an unlawful act some serious bodily harm, which might probably end in depriving him of life. *McCoy v. The State*, 25 Texas, 33; *Farrer v. The State*, 43 Texas, 271; *Ake v. The State*, 30 Texas, 466; *Cooper v. The State*, 31 Texas, 185; *Primus v. The State*, 2 Texas Ct. App. 369; *Murray v. The State*, 1 Texas Ct. App. 417.

3. Where fresh provocation intervenes between preconceived malice and the death, it will not be presumed that the killing was on the antecedent malice. *Murray v. The State*, 1 Texas Ct. App. 417; 2 Stark. on Ev. 712; *The Commonwealth v. Jones*, 1 Leigh, 712; *McCoy v. The State*, 25 Texas, 43. But such killing may be proved to have been actuated by the preconceived malice. Same authorities.

4. The reasonable doubt is applicable, and must be weighed in determining between murder of the first and second degree. *Murray v. The State*, 1 Texas Ct. App. 424; *Guagando v. The State*, 41 Texas, 634.

The distinction between murder in the second degree and manslaughter, where the killing takes place in a conflict between the parties, is: the killing in the one case is from passion arising from an inadequate cause; while in the other, the passion arises from a cause which is adequate. 1 Pasc. Dig., arts. 2250–2260.

No killing which results from a sudden passion, whether the passion arise from an adequate or inadequate cause, or from a reasonable apprehension of danger to the life or person, or to protect property about to be stolen, or to prevent the killing of another unlawfully, can be murder in the first degree. The element of express malice in such

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case is wanting. *McCoy v. The State, Murray v. The State, and Primus v. The State*, cited *supra*.

We deem ourselves wholly within the line of decisions expounding the law of the State when we say the foregoing propositions are no longer open questions. The principles which distinguish between the degrees of culpable homicide are fixed, the only difficulty being to apply the law to the facts which surround the act of killing.

II. 1. Before a party can be held, on an examination for bail, the several elements of murder with express malice must be evident from the proof: first, sedate mind; second, formed design; third, intent to kill.

2. Where there is (1) fresh provocation; or (2) doubt on either of the three elements of express malice; or (3) where there is a reasonable apprehension of danger to the life or person, or to property, or to human life; or (4) doubt as to whether the killing is murder of the first or second degree, — then, on trial before a jury, a verdict of murder in the second degree would be sustained, while one for murder in the first degree would be set aside; and on trial for bail, bail will be allowed, because the only verdict that would be upheld would be for an offence bailable under the law. Const. 1876; *McCoy v. The State, Primus v. The State, Farrer v. The State, Murray v. The State, Cooper v. The State, Ake v. The State*, cited *supra*.

3. The law of presumption, so far as the question in this case is concerned, has been done away with, — we mean the question of the right of the citizen to bail. Const. 1876, cited *supra*.

III. The expression of the law as made by Justice Roberts (*McCoy v. The State, supra*) was while the Constitution of 1845 was in force, and when if the proof was not evident, but the presumption great that the defendant was guilty of a capital offence, bail could legally be refused. Not so

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now, however; the proof of guilt of a capital offence must be evident, or else the right to bail cannot be legally disallowed. We do not know that the language of the court in the McCoy case would have been different to what it was, had our present Constitution been then in force; but, had there been a difference, it would have necessarily been more liberal to the appellant. But no matter for that; our position is that under the construction of the Constitution and law as they existed in 1860, — severer then than now on the applicant for bail, — the appellant here would be entitled to bail.

IV. 1. What was the object of the framers of the Constitution in pretermittting the words “or presumption great,” retaining only “where proof is evident?” Certainly there was an object, and equally certain there was a practical purpose in view. Our reading of the Constitution — the section cited — teaches us that the object and purpose were to confine non-bailable cases to a narrower limit than the bounds thereof under the prior Constitution of 1845; in other words, it was the purpose to require a higher order of proof than aforetime, to deprive a citizen absolutely of his liberty. Human liberty seems to have been regarded by the late Convention as of higher value than did those who framed the Constitution of 1845.

2. When words are used, either in statute or organic law, they are, *prima facie*, used in their ordinary signification. If a technical word, then it shall be construed as a technical word; but if a common every-day word, then its meaning is as the word is commonly understood. The word “evident,” as used in the Constitution (art. 1, sec. 11), has a higher, a more positive, or a more definite meaning than “*presumption great*;” indeed, it is a word of power and definite meaning, conveying to the mind a fixed idea, that is almost tangible.

The word “evident” is a common word, — a word of the

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people, —and is used understandingly in the most familiar conversation; it means, “clear to the vision, especially to the understanding, and satisfactory to the judgment, * * * manifest, plain, clear, obvious, apparent, notorious.” Webster’s Unabridged Dictionary, 471.

It would be strange that so plain a word, with so plain a meaning, could be misunderstood, or that there should be serious difficulty in applying it to any state of facts which may exist in connection with a principal fact.

Where there can be serious debate in the mind whether surrounding facts and circumstances plainly and satisfactorily prove the main fact charged, as in this case, — a killing with express malice, — then such main fact is not evident from the proof, as demanded by the law. The proof may be of the dignity of “presumption great,” but certainly does not come within any definition of “evident.” Not only is this so, but where debate can be maintained in the mind, on the one side and the other, as in this case, as to the presence of express malice, then the reasonable doubt necessarily exists, and the party cannot be held as for murder of the first degree.

We desire to call the attention of the court, with special particularity, to the facts in evidence, and to which we apply the foregoing principles of law.

We deem it evident that the killing was independent of any antecedent malice, whether in the shape of former grudges or as evidenced by threats. There is no evidence of former grudges. The testimony relative to threats is of a threefold worthless character: first, contradictions; second, unreliable witnesses; third, not practical, burdened with a present intent to execute; — and they were foreign to the facts and circumstances surrounding the killing.

We claim that the evidence teaches that the killing took place under one or the other of the following emotions:

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1. Actual fear of life, limb, or great personal harm.
2. In the actual protection of property about to be stolen.
3. To save human life in danger of being taken ; or,
4. A reasonable apprehension that the one or the other would be the case.

All the evidence comes from the State, save only as to appellant's surrender, and his ability to give bond, together with his age.

All the parties, actors and witnesses, who knew of the facts attending the killing, were and are boys from seventeen to twenty years of age,—an age when life is exuberant, words free, and actions not well or critically considered ; indeed, when action is an impulse, not impelled by intent, nor restrained by ultimate consequences.

The dying declarations of the deceased were without force, because they were, in soul, proven to be false,—a hard word, but nevertheless true. His account given to his mother, of where he was going when he met appellant and Bailey, was false. This is beyond dispute, according to the evidence. The evidence of Grant, disputing the dying declarations of deceased, is supported by that of Muir and that of Campbell, as also by that of Randolph.

But we wish to call the careful consideration of the court to the facts as given by witnesses who were sworn, and who in person were liable to punishment if they swore falsely.

We take that of Grant, the first witness, who saw the shooting. He says :

“ We knocked about town until about eleven o'clock ; came back by Katie Franklin's, and when about the gate, one of the boys said, ‘ Yonder is Bailey now.’ Gus Porter (deceased) left us, went into the house, remained a few minutes, came out, and we all passed on toward the hobby-horses ; saw they were closed, when Porter said, ‘ *Let's go up town.*’ We started ; * * * got to the alley in the rear

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of Katie Franklin's, when we saw, or heard, Bailey and McKinney coming out of the back gate of Katie Franklin's, in the alley. Two horses were hitched near the west end of the alley. The back gate was between twenty-five and thirty yards east of the horses. When we saw them, Gus Porter said, 'Hold on, boys, I want to see Gent Bailey about calling me a s—n of a b—h.' We crossed the mouth of the alley, and stopped near the north-west corner. * * * Porter *went into the alley to where the horses were, and remained there* until Bailey and McKinney were within fifteen feet of the horses, *when he stepped out* into the middle of the alley, at the * * * tail of the horses, and said, 'Bailey, did you call me a s—n of a b—h?' Just at this moment McKinney said, 'Throw up your hands.' Porter threw up one hand, which one I could not tell, and said, 'Hold on, I don't want any fuss with you;' * * * when McKinney said, 'Throw up your other hand, or I will kill you, G—d d—n you,' and fired. Before McKinney shot, and just when he said, 'Throw up your hand,' etc., Bailey said, 'Don't shoot me, Gus, I have done nothing to you.' Bailey was getting on his horse. As he made this remark, McKinney fired."

The boy's evidence foreshadows the whole case of the State; and on it bail is allowable, because the three defences we set up are reasonable, under the facts, in a case of this character,—that is, their falsity is not evident. But the case of the State is greatly weakened by other witnesses introduced by the State. The boy Muir says, "McKinney told Porter to throw up his hands, three times; * * * that he is satisfied, though not absolutely certain, that Porter threw up *his left hand*."

Again, the witness Campbell says: "When the remark was made, 'Yonder is Bailey,' Porter left them, saying, 'I'll go and see him;' * * * went into the gate; * * * when he returned he was wearing a pistol;

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* * * had not observed it [the pistol] during the several hours they had all been up town," etc.

But yet further, the witness Randolph, who seems to be the honest man of all who saw and testified, says: "I jumped on Grant's back when about reaching the gate [that of Katie Franklin's or Mollie Seymour's], which enabled me to see over the fence into the hall of Mollie Seymour's house, and I saw Bailey standing in the hall; I remarked, 'Yonder is Bailey now.' I did this because Porter said he wanted to see Bailey about that postal-card. Porter said, 'I will go and see him, and overtake you in a minute.' Porter * * * returned * * * and said, 'They are fixed for me; their horses are in the alley; I will go around there and settle the matter.' We all then went to the mouth of the alley, and Porter said, 'You boys go up the fence a little way, and wait for me.' * * * Porter stepped a couple or three feet into the alley, and *waited* there about half a minute, * * * when Bailey and McKinney *came out* into the alley the *back way*, * * * some thirty yards from their horses; came up the alley talking; and when in about ten feet of their horses, Porter was at the rear of their horses, when McKinney said, 'Who is that?' There was no reply. Then McKinney said, 'Throw up your hands!' Porter threw up one hand. McKinney said, 'Throw up your other hand!' Porter said, 'Hold on!' McKinney said, 'Throw up your other hand, or, G—d d—you, I'll kill you!' and fired."

The foregoing, with the following, constitutes the material evidence which surrounds the killing.

1. A. L. Miller says: "Never knew him (Porter) to have a pistol before."

2. Mrs. Porter (the mother) says: "They (Bailey and McKinney) went out at the back door. Gus Porter had previously gone out at the front door, saying to me he was going to bed. * * * His room was in a south-easterly

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direction from house of Katie Franklin, in the rear of whose house the shooting occurred, and about two hundred yards away. Where he was shot was in a north-westerly direction from the house of Katie Franklin. * * * He never wore arms; he owned no pistol. Don't know where he got the pistol he had on that night. I know he did not own a pistol."

3. Bob Grant says: "Knew Porter well, as also McKinney and Bailey; was intimate with them; never knew Porter to wear arms; did not know he had a pistol that night; don't know when nor where he got it."

4. Campbell, Muir, and Randolph all support the statement of Grant in that they never knew Porter to wear arms, save that Campbell saw him with one when he came out of the house just before the shooting.

Thus, we believe, ends the evidence, so far as it is material in indicating the true facts of the case; and now:

We submit that, taking the whole of the testimony of the State, without comment, contradiction, or explanation, by and through which express malice is sought to be raised, there is not an imperfect skeleton of express malice, at best; and when confronted by the facts drawn out on the cross-examination of State's witnesses, the skeleton is shaken to pieces and its marrowless bones consigned to corruption, in which we have serious fears to believe much of the testimony of the State's witnesses has been engendered.

Taking the facts of the case, and measuring the guilt of appellant by the law applicable to the facts, we fail to see evident proof of a killing with express malice, and we look alone through the light of the law as furnished by adjudicated cases recognized by this court as embodying the principles of sound reason and good law.

But admitting, for the sake of the argument, that by the supposed threats — brought to view by doubtful testimony at

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best, much of which has met with contradiction, both by living witnesses and connecting circumstances, and the rest repeated from casual conversations, perhaps but half understood and imperfectly reported — the State has raised a great presumption of express malice; that will not be enough to hold appellant and refuse bail. Const., art. 1, sec. 11.

The proof of express malice must be evident; not only so, but where such malice is to be inferred from threats, the threats themselves must be positive in character, unconditional, pregnant with intent to carry them into execution, and the utterance of a sedate and deliberate mind, — such threats as would subject the party making them to indictment and conviction under the statute. 1 Pasc. Dig., arts. 2454–2456; 2 Pasc. Dig., arts. 6585–6588.

We further submit that it is evident, that it must be evident, to any candid mind impartially surveying the facts which surround the killing, — the actual surroundings, the hour of the night, the manner of the meeting, the words that were said — that the killing ensued from the occurrences then taking place, and that said occurrences reasonably had the effect to impress the mind of McKinney with the belief of the existence of one of these three facts:

1. That a man was there to do him hurt, to life or person; or, —

2. That he was there in the act of stealing; or, —

3. That he intended to do some hurt to the life or person of his companion.

If the fatal shot was fired under the belief of the existence of either of the above facts, then the killing could not be murder of the first degree, but must necessarily come below that degree; the descent depending on the reality of the danger, and the actual emergency calling on him to act.

That Porter had some hostile purpose in view — not, perhaps, extending to an intent to take life, but certainly hostile — seems to be beyond doubt. The opportunity had

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just passed for him to see Bailey in the house, and in the light, where differences between them might have been settled; but no, he preferred to ascertain where the horses were, which he certainly did when he went into the house, there being no other opportunity for him to do so, and then arm himself with a pistol and waylay the horses, to which he well knew the man Bailey would soon come. These acts, accompanied with the expression that he would then and there (at the horses) settle the matter, produces a conviction on the mind that he was hostile; no calm mind can escape the conviction. *Settle the matter.* How? Amicably? Why not have done so in the house? Did not Porter go to and remain with the horses for some unlawful purpose? If not, why did he select so fit a place, and prepare himself so well for such an act? If his intent was to do an unlawful thing, no matter the degree, who shall measure the extent to which he had determined to go? Why the cry of Bailey, "Don't shoot me," before McKinney shot? Why did he thus cry out? Was it because Porter had drawn his pistol, or made other demonstrations evidencing an intent to shoot? Why the cry? If there was cause for the cry, then was the time for McKinney to act. It was the life of Bailey or of Porter; and that, too, when Porter was lying in wait, having all the advantages.

Again, why not an honest reply when the hail, "Who is that?" was made by McKinney? Why silence at such a time and under such circumstances? Was not the silence calculated to arouse suspicion, doubt, and fear? "Put yourselves in his place;" the country full of assassins and thieves. What would you have done? What would your care of self have demanded of you to do?

And again, why did Porter throw up but one hand? No one pretends that he threw up both. Why only one, right or left? What was he then doing with the other? Muir says the left hand was raised, the right down. In what was

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that right hand engaged? If there was reason to throw up one, why not both? The movement of that other hand — his tongue silent, but hand active — was evidently what called out the cry from Bailey, “Don’t shoot me.”

After all the case has been gone through with, the question returns, Is appellant entitled to bail? And this question must be answered by replying to others, either one of which being answered in his favor, bail follows.

1. Was express malice present?

2. Is it evident express malice was present?

3. Is there a reasonable doubt as to whether express malice was present?

4. Was there fresh provocation, and did it move to the homicide?

5. There being fresh provocation proven, and the law prohibiting the presumption that the antecedent malice (conceding there was such malice) actuated the killing, *is it not clear that it is not proven that such antecedent malice caused the killing?*

6. Is there a reasonable doubt as to whether antecedent malice is proven; and if not, is there reasonable doubt that it, and not the fresh provocation, actuated the killing?

7. Is there reasonable doubt as to whether there was fresh provocation, and that it, and not antecedent malice, caused the killing?

8. Was deceased there with hostile intent?

9. Did deceased make any hostile demonstration?

10. Did deceased make demonstration as if to draw a weapon? Did Bailey think so, and cry out?

11. Did appellant believe, or have reason to believe, deceased was about to draw a weapon and use it?

12. Is there reasonable doubt on this proposition?

13. Did McKinney believe, or have reason to believe, that the man (deceased) was there to do harm to him, his companion, or property?

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14. Is there actual doubt of the above proposition?

We are under thorough conviction, from the law and the evidence, that the killing in this case was not with express malice; that it cannot be lifted, by any means, to that high degree of crime.

Sheeks & Sneed, of counsel for the State, submitted a cogent review of the evidence to demonstrate express malice.

Thomas Ball, Assistant Attorney-General, for the State, maintained that in no view of the case was the appellant entitled to the privilege of bail, citing *Jordan v. The State*, 10 Texas, 479; *Gherke v. The State*, 13 Texas, 574; *Atkinson v. The State*, 20 Texas, 531; *Murray v. The State*, 25 Texas, 52; *Sharp v. The State*, 1 Texas Ct. App. 300; *Dubbe v. The State*, 1 Texas Ct. App. 164; *Jones v. The State*, 3 Texas Ct. App. 150; *Hulbert v. The State*, 3 Texas Ct. App. 659; *Hill v. The Commonwealth*, 2 Gratt. 603; *The People v. Tinder*, 19 Cal. 541; *Ex parte Taylor*, 39; *Ex parte McAnally*, 53 Ala. 496.

WHITE, J. Appellant was indicted in the District Court of Travis County, jointly with one Gentry Bailey, for the murder of one Gus Porter. The murder is alleged to have been committed on November 15, 1878. On November 21, 1878, the indictment was found and returned into court. District Court being in session, McKinney applied for and obtained from the Hon. E. B. Turner, judge presiding, a writ of *habeas corpus*, for the purpose of obtaining bail. His application was heard in open court, on December 26, 1878, and bail was refused. From that judgment he appeals to this court.

We have examined the record presented here, with great care, and have had, to aid us in our investigations, the very able briefs and oral arguments of counsel, and yet we are

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constrained to say that, in our opinion, no error is perceived in the action of the court below in refusing bail to the applicant. Following the uniform practice in such cases, we forbear comment upon the facts.

The judgment of the District Court of Travis County is affirmed, and it is further ordered that the appellant pay all the costs of this proceeding.

Ordered accordingly.

DAVE ROBINSON v. THE STATE.

1. CHARGE OF THE COURT. — In the trial of a felony case, it is the duty of the court to give in charge to the jury the law applicable to the case, whether asked or not.
2. SAME — EVIDENCE — CASE STATED. — Indictment for theft of a beef alleged the property in one M., and it was testified that it bore the brand of M. The hide, being produced in court, and identified by the defendant's witnesses, was found to be in the brand of one P., and not in that of M. The question then properly before the jury was whether the property was in M., as charged in the indictment; and the evidence presenting a direct conflict, it is *held* that the court should, as part of the law applicable to the facts, have charged that unless the jury were satisfied beyond a reasonable doubt that the property was in M., as charged in the indictment, they should acquit.
3. EVIDENCE. — The allegations of an indictment must be sustained by the proof, or a conviction will not stand.

APPEAL from the District Court of Gonzales. Tried below before the Hon. E. LEWIS.

The conviction was for the theft of a beef, and the punishment was assessed at five years in the penitentiary.

Harwood & Winston, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

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WHITE, J. Appellant was indicted and convicted for the theft of a beef of Mrs. Mahan.

The testimony shows that before, and at the time of, and after killing the beef, the defendant said he had bought it of Mrs. Mahan. All the evidence establishes that the beef was killed openly and publicly, without any effort on the part of defendant at concealment; that he sold portions of it to neighbors, telling them how he came by it; and that the hide was hung up where any one passing could see it. Mrs. Mahan went over to defendant's house, with her son-in-law, and they both say they examined the hide, found her brand upon it, and identified the animal as her's. She further said that she had never sold a beef to defendant, or given him her consent to kill one of her's.

On behalf of defendant a number of witnesses testified, some as to the killing of the beef, all as to the hide taken or skinned off the killed animal; and the hide was also produced in court and identified by the witnesses. This hide was not in the brand of Mrs. Mahan, but had upon it the brand of one Parsons.

On this state of facts, the question naturally and squarely presented is, Was the beef which was killed by defendant the property of Mrs. Mahan, as alleged in the indictment? This was the prominent salient feature of the case as made by the proof. With regard to it, as we have seen, the testimony was directly conflicting. Such being the case, in our opinion the defendant was entitled to have the jury instructed, as part of the law applicable to the facts, that unless they were satisfied beyond a reasonable doubt that the ownership of the animal was in Mrs. Mahan, as charged, they should acquit. *Kay v. The State*, 40 Texas, 29. It is true that no special instruction covering this point was asked by defendant, as was done in Kay's case; yet, nevertheless, the case being a felony, the law applicable should have been given, whether asked or not. If the beef was in fact Par-

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sons's, instead of Mrs. Mahan's, defendant could not have been legally convicted in this case, because there would have been a fatal variance between the allegation and the proof of ownership.

The failure to give such a charge, under the circumstances of the case, will necessitate a reversal of the judgment; and, upon a new trial, the defendant will have an opportunity to avail himself of the newly discovered evidence set out as part of his motion for a new trial.

Reversed and remanded.

JAMES ZUMWALT AND ANOTHER v. THE STATE.

1. CONTINUANCE. — Though perfect in every other requirement of the statute, an application for a first continuance is fatally defective if based upon an affidavit that fails to allege that the continuance is not sought for delay.
2. SAME. — Applications not based on the statute, nor conforming to its requirements, are addressed to the discretion of the court below, and its disposition of them will not be revised on appeal, except when it appears that there was an abuse of such discretion.
3. CONFESSION. — Note a state of case in which it was correct to admit in evidence, against the defendants on trial, a confession which a joint offender, not on trial, made while under arrest.

APPEAL from the District Court of Gonzales. Tried below before the Hon. E. LEWIS.

The indictment charged James Zumwalt, William Walton, and Reuben Zumwalt with the theft of a gelding, the property of O. W. McBride. The two former jointly asked and obtained a severance from Reuben Zumwalt; and being found guilty, their punishment was assessed at ten years in the penitentiary. A new trial was refused, and they appealed.

McBride, the owner of the gelding, testifying for the

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State, deposed that the animal was taken from his possession without his consent. He was stolen in Gonzales County, on the night of January 10, 1878. On that night witness fed and turned him into the field loose. He was missed next morning, when witness went into the field to get him up. Witness examined the country in the neighborhood of the field, and soon found the tracks of two horses going round the field. After following these tracks around to the north-east corner of the field, witness saw where two other horses had come to them. Witness followed these tracks some three miles, observing that the tracks of his horse were among them, which he identified by the size and shape, and found where two other horses had joined them. Witness then followed the track to the house of Adam Zumwalt, in Kerr County, some fifteen miles above Kerrville, and distant some 150 or 200 miles from the house of witness. Witness and his party heard of the appellants frequently before reaching their house, in Kerr County, in doing which six days were consumed. They reached the premises before daylight on January 17, 1878, and immediately surrounded the house. A woman came to the door when they got the house surrounded, and to an inquiry responded that there were no men in or about the house. About that time, witness and his party heard a noise in the house like the cocking of a pistol, and asked the woman what it was, to which she responded that the noise was made by hogs under the house, eating corn. Witness and his party then declared that they would not leave there until the men came out, as they knew them to be there, and who they were. After quite a long time, the appellant James Zumwalt came out, and then William Walton, and finally Reuben Zumwalt, whom witness recognizes to be the men now in court. Witness then got his horse from near the house, where he was tied.

Witness was accompanied in this expedition by ten or

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eleven of his neighbors, some of whom had lost horses the same night that witness's horse was stolen. This party was armed. When James Zumwalt and Walton came out of the house, witness told them to sit down, as he was not sure that either was the man he wanted. When Reub Zumwalt came out, witness told him that he "was never so glad to see him in his life," and asked him where the horses were. He said he would go with us and show us where they were, and that witness's horse was "down there." Witness found no other men than these three, and brought all of them back and turned them over to the sheriff. Witness's horse which was stolen was worth about \$60.

James Baker, for the State, one of the party which arrested the appellant, corroborated the last witness in all material particulars, and added that when Reub Zumwalt came out of the house he said, "You boys have caught us. I am a rascal, and am glad of it." When asked where the horses were, he answered that he would show us "their" horses, or the horse they "brought there." He then carried the party off some two or three hundred yards, where McBride's horse and three others were found. Reub Zumwalt then said there was another horse there somewhere, and soon one of the party brought up a horse which was out of sight. These horses could not be seen from the house, and witness and party did not know where they were until shown.

Jesse A. Clark, for the State, corroborates the testimony of the other two witnesses, and adds that on the night of the same 10th of January he lost two horses, and followed these appellants with the others. *En route*, found one of his horses traded off. At Zumwalt's he found the horse for which his was traded. One of witness's horses came home. He proved and got the other.

James Pittman, for the State, testified that on the evening of January 10, 1878, he was out in the road near his father's house, and about four miles distant from McBride's; and

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while standing there, saw this party going along through the woods. Had known Reub Zumwalt some two years, but had never seen the others of the party before. Recognizes the three men at the bar as the three men he saw that evening.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellants were tried and convicted on a charge, in connection with one Reuben Zumwalt, of theft of a gelding, the property of one O. W. McBride.

It is proposed to notice specially in this opinion but three of the errors complained of in the bills of exception and in the assignment of errors: First, the refusal of the court to grant a continuance; second, the alleged error of the court in permitting the acts and statements of Reuben Zumwalt to be introduced as evidence against these appellants; and, third, the refusal to grant a new trial.

1. Agreeably to the record, three persons were charged with the theft, to wit, these appellants and Reuben Zumwalt, who was tried separately. All three joined in an affidavit for a continuance, stating that "they are not safe in going to trial * * * for the want of testimony material for their just defence," setting out the names and place of residence of two witnesses, the diligence used to procure their attendance, what they expect to prove by the witnesses, and showing its materiality, and certain other formal averments. The affidavit, however, fails to state that a continuance is not sought for delay; and it is shown by a statement made by the judge, appended to a bill of exceptions to the ruling of the court on the application for a continuance, that it was refused solely on the ground of this defect in the affidavit.

In this ruling the court did not err. One of the requisites

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for a first continuance by the accused in a criminal case, for the want of a witness, is that he shall state “that the application for continuance is not made for delay.” Code Cr. Proc., art. 518 (Pasc. Dig., art. 2987). The application did not come up to the requirements of the Code. Applications for continuances, not based upon the statute, and which do not meet its requirements, are addressed to the discretion of the court to whom they are made, and should be granted or refused according to the circumstances; and the ruling of the court thereon will not be revised on appeal, except in a clear case of abuse of that discretion. *Baldessore v. Stephanes*, 27 Texas, 455; *Nelson v. The State*, 1 Texas Ct. App. 41; *Jackson v. The State*, 4 Texas Ct. App. 292, and authorities there cited. The subsequent action of the appellants did not cure the defect in the first affidavit.

2. It is urged on the part of the appellants that “it was gross injustice to the defendants to allow the confessions of Reuben Zumwalt to be placed before the jury,”—on the ground, apparently, that he was under arrest at the time they were made.

It is true that, by the provisions of the Texas Code, a “confession shall not be used if at the time it was made the defendant was in jail, or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or made voluntarily, after having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or circumstances that are found to be true,—[for example] such as the finding of secreted or stolen property,” etc. Still, if, under the above rule, “the confession was freely made, without compulsion or persuasion, they are admissible.” Pasc. Dig., arts. 3126, 3127.

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We are of opinion the court took a correct view of the law bearing on the subject of these statements of Zumwalt, set out in the explanation to a bill of exceptions taken to the ruling upon the evidence, as follows: "The court permitted said statement because it proved to be true, by leading to where the horses were, though already found by two other persons not of the house-surrounding party, and because it had been shown that these co-defendants were seen together in Gonzales County the day the horses disappeared."

3. With reference to alleged error in refusing a new trial, several of the grounds of the motion have already been considered. As to the charge of the court on the subject of principals or principal offenders, we are of opinion the law of the case, as applicable to the facts proved, was properly given to the jury. *Berry v. The State*, 4 Texas Ct. App. 499, and authorities there cited; *Bybee v. The State*, 4 Texas Ct. App. 505.

As to the general charge, the question of the guilt or innocence of the accused was fairly submitted to the jury. The charge refused can hardly be said to be applicable to the case as made by the proofs. The several grounds of error complained of have been carefully considered; and from the whole case as here presented, we find no such error as would warrant a reversal of the judgment or the granting of a new trial. The judgment is affirmed.

Affirmed.

HENRY CROCKETT v. THE STATE.

1. THEFT. — An animal is in the possession of its owner when it is on its accustomed range.
2. SAME. — Possession of the person unlawfully deprived of property is constituted by the exercise of actual control and management of the property, whether the same be lawful or not.

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8. **INDICTMENT — OWNERSHIP.** — If the property stolen is the property of a widow and her children who are under her control, the ownership may be alleged to be in the widow.

APPEAL from the Criminal District Court of Harris. Tried below before the Hon. J. MASTERSON.

The conviction was for the theft of a cow, and the punishment was assessed at two years in the penitentiary.

The property was alleged to be in Madam Benson, and the proof showed that it was the property of Madam Benson and her children by her deceased husband, the children being still minors and under her control. No administration on her husband's estate had been had, nor any partition of it between her and the children.

No brief for appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Charge in the indictment alleged the ownership of the cow to be in Madam Benson. Proof showed the cow was the community property of Madam Benson and the three minor children of her deceased husband and herself; that the minors lived with their mother, who was head of the family; and that the cow was taken from its accustomed range.

A bill of exceptions was saved to the third paragraph of the charge to the jury, which was: "3. If the cow of Madam Benson was in its usual and accustomed range, and if the same was fraudulently taken by defendant and appropriated to his use, so as to come within the definition of theft as already given you in charge, then such cow was in the possession of the owner, and no further possession of the owner is necessary to be shown. If the proof shows that the cow was owned by Madam Benson and her children by Benson, at Benson's death, and if Mrs. Benson, as widow

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of deceased Benson, was the head of the family, and as such she claimed to and did control, use, care for, and possess for herself the cow alleged to have been stolen, then such ownership, jointly with her minor children by Benson, and possession by herself, is sufficient; and it is of no importance that the ownership was partly in the minor children of Benson, deceased."

We see no error in this charge. An animal is in the possession of its owner when in its accustomed range. *Jones v. The State*, 3 Texas Ct. App. 498. "Possession of the person so unlawfully deprived of property is constituted by the exercise of actual control, care, and management of the property, whether the same be lawful or not." Pas. Dig., art. 2387; *Gaines v. The State*, 4 Texas Ct. App. 330.

Upon the other doctrine, enunciated in the latter portion of the charge, the case of *Henry v. The State*, 45 Texas, 84, is directly in point. Henry was indicted for the theft of "two certain oxen," the property of Mrs. Mary Cobb. The testimony showed that the property belonged to Mrs. Cobb and the children of her deceased husband, on whose estate there had been no administration, and was in possession of Mrs. Cobb before the theft. It was held that the proof sustained the allegation of ownership, and the conviction was sustained. See also *Ware v. The State*, 2 Texas Ct. App. 547.

We are unable to perceive any error in the proceedings had on the trial below, which resulted in the conviction of this appellant; and the judgment is therefore affirmed.

Affirmed.

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J. H. TAYLOR v. THE STATE.

THEFT OF CATTLE — CHARGE OF THE COURT. — In addition to other charges correctly given, the jury were instructed, in substance, that if they believed that the appellant was acting in the capacity of an employee to a person who claimed to own the stolen stock, and acted under his employer's orders, believing honestly that the latter did in fact own the stock, he should be acquitted; but if, on the other hand, though he was in fact a hired hand, he acted for the employer knowing that the cattle were not his, and that his intent was to steal the same, he was guilty of theft of the cattle. *Held*, correct.

APPEAL from the District Court of Erath. Tried below before the Hon. J. R. FLEMING.

The indictment was for theft of cattle; the defence, that appellant was acting in good faith as agent for a supposed *bona fide* owner. The judgment was conviction, and the punishment assessed was five years in the penitentiary.

A condensed statement of the evidence appears in the opinion. Another appeal by this same party, from a similar conviction based upon like evidence, was affirmed in an opinion which refers to the one here reported.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. When the cattle were sold to Glenn, the appellant and the party Hannon, who made the sale, stated that he, Taylor, the appellant, was in charge of the herd as an employee or hired hand of Hannon. The evidence shows that defendant lived with Hannon; that Hannon did not own any cattle; that, several weeks before the cattle were stolen, the defendant was at Glenn's house, and told him "that there was a man down where he lived, somewhere below Dublin, who had twenty-five or thirty head of cattle that he wanted to sell, to raise money to pay a land-

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note, and asked him (Glenn) if he would buy them." Glenn told him to bring them and he would. Two or three weeks afterwards, defendant and Hannon brought the cattle—twenty-two head—to Glenn, and sold them to him. All the cattle were proven to have been stolen,—stolen from parties living in the same neighborhood, about thirty-five or forty miles from the place where they were sold to Glenn.

The defence was that defendant in this case was a hired hand. Upon this point the court gave the following instruction to the jury, having previously charged the law appropriately with regard to principals or joint offenders acting together in furtherance of a common design, with an unlawful purpose: "If the jury believe from the evidence that at the time of the alleged taking the defendant was a hired hand in the employ of the said Hannon, and assisted the said Hannon in taking possession of and driving said cattle, under the instructions of the said Hannon, and at the time of said taking the defendant believed that the said cattle were the property of the said Hannon, and had no knowledge of any criminal intent on the part of the said Hannon in the alleged taking, you will find the defendant not guilty. But, on the other hand, the jury are charged that the fact that the defendant was a hired hand will not in any degree lessen or excuse the offence if he knew that the said cattle did not belong to said Hannon, and that the said Hannon was stealing the said cattle, and, so knowing such unlawful intent and act on the part of said Hannon, aided and assisted the said Hannon in committing such offence."

This instruction properly presented the law applicable to this branch of the case. *Ivey v. The State*, 43 Texas, 425. Indeed, the whole charge as given to the jury expounded the law most fully and ably upon the facts adduced in evidence. The testimony in this case shows that the defendant must have known, and did know, that the cattle were stolen; and in that respect bears a marked difference from the cases of

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Perry v. The State, 41 Texas, 483, and *Allen v. The State*, 42 Texas, 517, where the defence was the same as in this case, viz., that defendants were hired hands. No error is perceived in the record, and the judgment is, therefore, affirmed.

Affirmed.

BUNK GATLIN v. THE STATE.

1. PRACTICE — CHARGE OF THE COURT. — When the offence charged is one that admits of degrees, and the evidence developed on the trial tends to the establishment of guilt of an offence of lower grade than that charged, the difference between the different degrees should be explained to the jury by an instruction from the court.
2. SAME. — But, on the other hand, when the evidence establishes one of the higher grades charged in the indictment, the court is not required to charge upon the lower grades. See the opinion for charges conforming to these two rules, *held* properly given.
3. SAME. — In every case, it is the duty of the court to give in charge to the jury the law applicable to the case as made out by the testimony; and when, as in this case, the facts developed will not reduce the offence to a grade upon which a special charge is asked by defendant, it is the duty of the court to refuse the charge.
4. HOMICIDE — INTENT. — The instrument or means by which a homicide is committed is to be taken into consideration in judging of the intent with which the act is done. See the opinion for a charge elaborating this principle, *held* a correct exposition of the law.
5. EVIDENCE. — It is the province of the jury, and not of the court, to deal with the conflict of testimony.

APPEAL from the District Court of Hill. Tried below before the Hon. D. M. PRENDERGAST.

The conviction was for murder in the second degree, and the punishment assessed was seven years in the penitentiary.

W. P. Pardue, the father of the deceased, was the first witness examined for the State. His son died from the effects of a wound received on the night of October 26,

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1877. About three days before the death of deceased, witness consulted with the attending physicians, Drs. Schofield, Douglas, and Niese, and from them learned that the deceased was not likely to recover. Witness then told his son that the doctors entertained such opinion; to which information he responded that he had himself been conscious for some time that he would not recover. Deceased then stated to witness that he had harmed no one, and was not afraid to die. Deceased was in his right mind; and then, without being questioned by witness or any one else, voluntarily stated that he received the wound at the hands of appellant, at the house of D. Matthews, in Hill County, where the deceased and appellant, with others, were attending a party. Deceased stated that appellant ought not to have stabbed him, as he (deceased) thought they were having a fair fight. The difficulty occurred about a dance. Deceased told witness that appellant failing to obtain a partner, deceased took the appellant's place on the floor. The appellant called deceased out of the house, and asked him why he had taken his place, to which deceased responded that Willis Burgess had directed him to take it. Appellant then called deceased a "G—d d—d liar," slapping him at the same time on the shoulder. Deceased then struck appellant, and pushed him off. At this juncture (according to the narrative of deceased, as given to the witness) deceased discovered a knife in the hand of appellant, and told him to put it up. Appellant either went off or some one interfered at this point, and deceased discovered that he had been cut. The witness states that the deceased was some seventeen years old at the time of his death; was taller than the accused, but witness does not know how they compared in weight. Deceased also had something the matter with his chest, and had suffered from hemorrhage during the preceding summer. The affray occurred in Hill County, Texas, on October 26, 1877

C. Baker testified, for the State, that he knew deceased

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in life, and that he knows appellant when he sees him, and pointed him out to the jury. Witness was not present at the difficulty, but went to the house of deceased's father and found deceased on the bed, wounded. Deceased seemed to be suffering very much, though he was in his right mind. Witness first heard Dr. Williamson say to deceased that he was in a bad condition ; could not get well ; that there was but a little while more for him, and that he was in the hands of a merciful God. Deceased responded that he had been for several days conscious that he could not get well. Deceased then voluntarily, and not in answer to any questions propounded, made a statement, which is summarized as follows : That the impression should not prevail that appellant did not do the cutting, for deceased saw the knife in his hand ; and, taking a fan from witness, showed how the knife was held. Appellant took an advantage of deceased, or deceased would not now be in his "fix." Deceased stated to witness that appellant called him out of the house, and said to him, "You have acted the d—d rascal." Deceased responded, "That is not so ;" and appellant said, "It is a d—d lie," and slapped deceased on the back, where the cut was made. Deceased then, though appellant in a manner held on to him, struck the appellant three or four times, and pushed him off. Deceased then noticed some papers fall out of his pocket, saw the knife in appellant's hand, and discovered that he was cut. At the time appellant struck deceased, deceased heard something blubber inside of him, similar to the pulsation of one's finger in another's hand (taking witness's hand and tapping it with a finger).

Deceased detailed this narrative to witness on Saturday night, after witness first went to see deceased.

Dr. Schofield, for the State, testified that deceased died from the effects of a wound in the right side, about the fourth rib from the bottom. The knife went into the liver,

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cutting a gash about three inches long and about three-fourths of an inch deep. The knife seems to have been withdrawn and thrust in again, or wrenched and sent into the cavity of the lungs and the "plural sack." Witness means that the knife penetrated the chest wall, wounding the "plural sack," lungs, and liver. This caused death. There was also a slight wound on the right arm. Dr. Williamson and witness made a *post-mortem* examination. Deceased was of medium size, was not stout, and had been suffering, the fall before, from hemorrhage of the lungs.

On cross-examination, the witness states that the knife entered about three inches from the centre of the spinal column, near to the transverse process. It appeared that after the knife was inserted, that it was turned or wrenched, or thrust in twice. The cut in the liver was about three-quarters of an inch deep and about three inches long. There was also a rent in the "plural sack," of about the half of an inch. Witness first saw the deceased about two or three days after the wounding. Thinks he went to see him the Monday after the Friday of the wounding, or it may have been several days after. Witness understood that Drs. Douglas and Williamson went to see deceased as soon as he was wounded.

On reëxamination, witness says that he means by breadth, the thickness of the knife; by depth, the extent to which it penetrated. The knife went about three-fourths of an inch into the liver, cutting a gash about three inches long.

J. D. Pardue, brother of deceased, sworn for the State, testified that the difficulty which resulted in the wounding of the deceased occurred at a party at the house of D. Matthews, in Hill County, Texas, and commenced about a set in a dance. Appellant failed to get a partner, and deceased took appellant's place. Appellant called deceased out of the house, saying, "I want to see you a minute." The two went out together, — appellant in front, and

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deceased following. Witness followed as quickly as he could, without discommoding the company. When witness reached the door, the parties were about six feet from the porch, striking each other. The deceased seemed to be striking appellant about the face and head, while appellant seemed to be striking around. As appellant staggered back, witness discovered that he held a knife in his hand, which witness told him to put up, and which he did. Some one then called appellant, and the two went towards the corner of the house; and the last witness saw of appellant that night, he was talking to this other party. Some one directed deceased to take the position in the dance. Witness thinks it was Willis Burgess.

On cross-examination, witness says that he is twenty years old. Witness was not engaged in the dance, but at the time was standing before a hole in the house, that had been cut out for a chimney. Deceased got a partner and took position in the dance, as soon as he was told to. As soon as the set was danced out, appellant went up to deceased and said, "Mr. Pardue, I want to see you a minute." Witness supposed there was a difficulty brewing, and followed out as soon as he could without disturbing the bystanders, of whom there were many standing on each side of the door. There was a porch in front, but no floor, and the parties were striking each other some six or eight feet distant from the porch. Deceased struck appellant once or twice about the face and head, and appellant staggered back. Witness had no pistol. When the difficulty was over, witness asked deceased why he didn't shoot appellant, to which he made no reply. Witness saw no pistol that night, but saw some papers fall out of the left side pocket of the deceased's coat. After the wounding, deceased stood for a minute or two before sitting on the sill of the door, and witness went for the doctor, leaving de-

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ceased at Burgess's store. Witness is some six or eight pounds heavier and a little taller and older than deceased.

On reëxamination, witness states that deceased's coat was cut from the back round to the front. Appellant's name had been called several times for the set, but he failed to get a partner. Deceased owned no pistol; and if he had one that night, witness does not know it, and saw none. While witness was searching his pockets for a pistol, after the difficulty, deceased asked witness what he was doing; and on being told, replied that he had no pistol.

Willis Burgess, testifying for the State, said that he was present at D. Matthews's house on the night of the difficulty. There was no special manager, and witness acted in that capacity rather of his own motion. When it came to appellant's time to take position in the dance, he failed to get a partner; and witness told deceased to take the place, rather than see the set broken up. Witness told appellant what he had done, and that if he could get a partner, deceased would give way. The dance had progressed four or five minutes, when witness saw the deceased and the appellant quarrelling, and heard appellant say, "Jimmie, I hate you!" Witness asked them to hush, and said to appellant that if he would hush, he (witness) would guarantee that deceased would; and the matter was dropped and the dancing went on. Deceased accused appellant of coming there to raise a difficulty.

On cross-examination, witness does not think that he did anything to interfere with appellant in getting a partner. When he first went up, the parties were quarrelling.

James Messiner, for the State, testified that he was at the dance when the difficulty occurred between the parties. Witness was standing on the porch, and heard some one say, "Now they'll have it." The appellant and deceased struck a few blows each, and witness then saw some white, like a

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shirt. Deceased said that he had gone in for a fair fight, and that the appellant gave him the "d—d lie," and he struck him.

On cross-examination, witness said the parties were out of the house before he knew anything about the difficulty. Does not know who said "Now they'll have it." Witness was standing on the porch when the fighting commenced. Though deceased was the taller, the appellant was the larger of the two, — not much difference in their sizes. Witness thinks the lower one stepped back when some one said "Put up that knife." Heard some one ask deceased how the difficulty originated, to which he replied, "He gave me the d—d lie, and I struck him." Witness understood deceased to say that he struck the first blow when appellant called him a d—d liar.

Dave Tanner, for the State, testified that he saw appellant go up to deceased, at the party, and heard deceased say, "You came to break up the party, and you shall not do it if I can help it."

On cross-examination, witness states appellant asked deceased to take his place in the dance; to which deceased replied, "No, but you've come here to break up this dance, and I intend to see that you don't do it."

Tom Weathered, for the State, testifies that he saw no great deal of the trouble. Saw that deceased was dancing, when appellant went up to him and asked if he (appellant) had authorized him (deceased) to take that place in the dance; to which deceased responded, "No, but you came here to break up this dance, and I intend to see that you don't do it." Up to this time, appellant had been behaving well.

James Ramsey, for the State, sworn, testified that he attended school with appellant and deceased about two months before the difficulty detailed by other witnesses. During ball-play, one day, appellant got to cursing, which

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was in violation of the rule. Witness and others threatened to tell on him ; to which he replied, that if we did he would whip us. Deceased then told us to tell on him if we wanted to, and he would see us out. He said to appellant, " Before you whip them, you'll have to whip me first ; " and that he could " whip him (appellant) on any part of the field."

D. B. Eberson, deputy-sheriff of Hill County, testified that he arrested appellant on November 12, 1877, in Bowie County, Texas, some 250 miles from the place of the difficulty. Heard no threats against appellant, either before or after the killing.

Willis Burgess, recalled, states that he was on the ground a minute or two after the difficulty. Saw no pistol on the ground, nor did he see any one examine for any. The State here rested.

J. W. Alexander, for the defence, testified that he was at the party at Matthews's when the difficulty occurred. On the evening of that day, witness went out to the house of appellant's father and asked appellant to go with him to the party ; but the appellant declined, saying that he had been hard at work that day, and was tired. Witness insisted, but appellant still declined. Witness then left, going about a quarter of a mile to get supper ; after which he returned to the house and found appellant with his shoes off, preparing to go to bed. Witness again begged appellant to go ; and after much persuasion appellant agreed, if witness would wait until he could dress, and get his mare, which was staked in a field, he would go. The two went together to the party. Witness had known appellant since January before, and had known him as an industrious, peaceable boy. Had never heard his character discussed in the neighborhood, but had heard him spoken of as a peaceable boy ; and, so far as witness knows, this was his character.

James Nese, for the defence, testified that when deceased

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was distributing tickets of invitation to the party, on the day previous to the party, he asked witness to lend him a pistol, as he expected a difficulty. Deceased did not procure a pistol from witness.

Burrell Wethered, for the defence, sworn, testified that he was at the party when the difficulty occurred. It began about a place in the dance; and the first intimation witness had of unpleasant feeling between the parties was derived from a remark of deceased's brother Joe, to the effect that "If appellant can make anything out of deceased, he is welcome to do it." Witness then saw deceased strike appellant, who staggered back under the blow. Appellant then made at deceased, and struck him what appeared to be an underhanded blow. After the parties were separated, witness heard deceased's brother Joe ask deceased, "Why did you not shoot the d—d rascal?" Witness heard no reply to this question, and saw no knife in appellant's hand, though he heard some one tell him to "put up that knife." Saw no pistol in the hand of deceased, or about the ground, when the difficulty occurred.

James Wallack, for the defence, testified that he was present and saw the difficulty. About the time Joe Pardue asked deceased why he "didn't shoot the d—d rascal," witness saw a pistol in the hand of deceased, which he dropped into his right pocket. Saw no knife in : ppe'lant's hand. Witness was the nearest person to deceased.

On cross-examination, witness says he did not hear appellant ask deceased, on the floor of the dance-room, to go out of the house with him; but did hear deceased say to appellant, when they had their words in the house, that he wanted to see appellant outside. Witness did not, in this court-house, in this county, before Judge Prendergast, who was examining this case on *habeas corpus*, make oath that he saw no pistol in the hand of deceased on the night of

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and at the time of the difficulty. Witness made no such testimony, nor has he since said to Bennett Rawlan, *en route* from Waco to Hillsboro, that he saw no pistol in deceased's hand on that occasion. The question was not asked him on the trial on *habeas corpus*, — and the witness was never in Waco in his life.

Capt. Mede, for the defence, testified that he visited the deceased often after he was wounded. On the Sunday or Monday after the difficulty, witness saw the deceased and talked with him. Witness saw him get up out of bed and walk around the room. When he lay down again, he told witness that he was doing tolerably well, and thought that he would get well.

Mr. Gatlin, appellant's father, sworn, identified a pocket-knife shown him (about two inches in the blade) as a knife which belonged to appellant at the time of the difficulty. Witness was in the habit of carrying said knife about him. Witness got the knife from the jailer, when appellant was first put in jail.

W. P. Pardue, witness for the defence, testified that he is the father of deceased. After the death of deceased, D. B. Everson made an affidavit before witness, who is a justice of the peace for Hill County, charging one Mr. Burson as accessory with appellant in the killing of deceased, and witness issued a *capias*, upon which Burson was arrested and lodged in jail. The affidavit was made by Everson of his own motion and accord, and without the intercession or advice of witness, in any manner whatsoever. Here the defence rested.

Dr. Schofield, W. P. Pardue, and Bob Taylor, being called by the State in rebuttal, testified that they were present when the examination upon *habeas corpus* was had, during which Wallack swore that he saw no pistol in the hands of deceased. Wallack's testimony impressed itself

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upon the mind of W. P. Pardue, and surprised him, as he had heard that Wallack intended to swear that he saw deceased have a pistol.

Mr. Gatlin, father, Jack Gatlin, brother of appellant, and Mr. Wallack, father of James Wallack, being sworn, testify that they were present during the investigation of appellant on *habeas corpus*, and that James Wallack did not swear that he saw no pistol in the hand of deceased. They heard the counsel for appellant, in answer to the question why he didn't ask the question of the witness Wallack, say that he purposely reserved that testimony for the final trial.

L. B. Stanley testified that he was present at that time, and did not hear the testimony imputed to Wallack.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. This is an appeal from a verdict and judgment of conviction of murder in the second degree, charged to have been committed by the appellant upon one James M. Pardue, in Hill County. It is averred in the indictment that the mortal wound was inflicted on October 26, 1877, and that death ensued therefrom on November 8, 1877. The indictment is for murder.

The errors assigned are: 1. That the court erred in its charge to the jury, and especially in not charging on manslaughter. 2. That the court erred in not giving charges Nos. 1, 2, and 3 asked by defendant's counsel; counsel stating in this assignment of error that charge No. 1 is on the subject of manslaughter, and charges 2 and 3 are with reference to the instrument used, and, it is insisted, "should have been given." 3. That the court erred in refusing the defendant's motion for a new trial. The grounds set out in the motion for a new trial, so far as they

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attempt to state any special grounds for the motion, are substantially the same as the assignment of errors, with the statement made in a general way that the court erred in its charge to the jury, and that the jury found their verdict contrary to the law and the evidence, and which do not point to any specific error of which we can consider.

Recurring, then, to the assignment of errors, the main question presented is as to whether the accused was or was not entitled to have the question submitted to the jury whether the homicide was manslaughter, and not murder of either the first or the second degree. In determining this question we must look to the testimony, it being the duty of the court to instruct the jury as to the law applicable to the case as developed by the evidence adduced on the trial.

The rule in *Hudson v. The State*, 40 Texas, 15, is believed to be a correct one, to wit: "When the facts in evidence shall conduce to establish that the defendant may be guilty of something less than that with which he is charged, when the offence admits of degrees, the difference between the different degrees should be explained to the jury by instructions from the court." On the other hand, when the evidence establishes one of the higher grades of the offence charged in the indictment, the court is not required to charge as to the lesser grades of the offence. *Hudson's Case*, above cited; *Jones v. The State*, 40 Texas, 188; *Holden v. The State*, 1 Texas Ct. App. 225; *Pugh v. The State*, 2 Texas Ct. App. 539. "It is only necessary to give such instructions as are applicable to every legitimate deduction which the jury may draw from the facts." *Bronson v. The State*, 2 Texas Ct. App. 47, and authorities there cited. This being done, nothing more is required.

We are of opinion that the following portion of the general charge fully and properly presented to the jury the only instruction required to be given on the subject of a reduc-

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tion of the crime below murder of the second degree, and as favorably for the accused as the testimony warranted :—
“ A party whose person is violently and unlawfully attacked may repel force by force, and is not bound to retreat in order to avoid the necessity of killing his assailant ; but in such case, in order to excuse or justify homicide, the attack must be such as to produce a reasonable expectation or fear of death, or some serious bodily injury. If the party killing sought and provoked the difficulty, with the intention of taking advantage of any hostile movement on the part of his adversary, he would not be either justifiable or excusable.

“ When an unlawful and violent attack is made by one person upon another, and the attack so made is not such as to produce a reasonable expectation or fear of death or great bodily injury, in order to excuse or justify killing under such circumstances, the person so attacked must use all other means in his power to prevent the injury, except to retreat, and the killing must take place while the person killed was in the very act of making such unlawful and violent attack. If from the evidence you believe that the defendant killed James M. Pardue, and further believe from the evidence that the killing occurred under such circumstances as would excuse or justify the act under the preceding instructions, then such killing would not be unlawful, and you should not find him guilty.”

We fail to discover that the proofs warranted or demanded a charge on the subject of manslaughter.

Those portions refused of the instructions asked are believed to be much more favorable to the accused than was warranted by the facts proved, and the court did not err in refusing to give them to the jury as part of the law of the case.

The court, in the general charge, instructed the jury on the subject of the legal inferences to be drawn from the

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character of weapon used in effecting the homicide, as follows :

“ The instrument or means by which a homicide is committed is to be taken into consideration in judging of the intent with which the act is done. If the instrument be one not likely to produce death, it is not to be presumed, in the absence of proof, that death was designed ; unless from the manner in which it is used, or the circumstances connected therewith, such intention evidently appears. It is a legal maxim that every one is presumed to intend whatever would be the reasonable or probable result of his own acts, and the means by him used. Hence, when a homicide is already established, and the instrument used, or the manner in which it was used, was reasonably calculated to produce that result, the law presumes that such was the design, and imputes or implies malice without further proof, and makes such killing murder in the second degree.”

This instruction is properly qualified to this effect, unless the proof showed circumstances of mitigation or justification, as to which proper instructions were given in another part of the charge.

It is hardly practicable to set forth the precise application and bearing of a particular portion of an elaborate charge, covering the various phases of the different degrees of murder, including full explanations of express and implied malice, as well as the doctrine of self-defence, by an isolated extract here and there ; and hence the necessity of the rule that the charge, in order to determine its sufficiency and applicability, should be taken and construed as a whole.

If we consider the general charge in the present case as a whole, and interpret each portion with reference to every other portion, we find in it the law of the case, in every legitimate light of the evidence, and we can but commend it as an able enunciation of the law in all its controlling

Syllabus.

features, and in which all the rights of the accused, under the proofs, were carefully guarded and fairly presented to the jury. We are, therefore, of opinion that the errors assigned with reference to the charge given, as well as those refused, are not well taken. Not only so, but, so far as we can determine from the record before us, the accused has had a fair and impartial trial, in which the momentous issues were properly appreciated.

There is, it is true, some conflict in the testimony. On this subject the jury were properly instructed by the court. It was the business of the jury to deal with this, under the law as given them in the charge; and from an inspection of the testimony, we are of opinion the jury did not abuse their trust. On the contrary, it appears to us to be ample to support a conviction of murder in the second degree.

There is nothing seen in the record, after a patient and careful examination of the whole case, which calls for the granting of a new trial or the reversal of the judgment of the District Court, and it is affirmed.

Affirmed.

GEORGE COFFEE v. THE STATE.

PRACTICE—CHARGE OF THE COURT.—The court, having failed in its general charge to instruct the jury that the accused is presumed to be innocent until his guilt is established by legal testimony, committed error in refusing to give such charge when requested by the accused.

APPEAL from the District Court of Lavaca. Tried below before the Hon. E. LEWIS.

The conviction was for the theft of five hogs, of the value of \$20, and the penalty assessed was one year in the penitentiary.

No brief for the appellant.

Syllabus.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. When this case was before this court on a former appeal, the judgment was reversed because of error in the charge of the court with regard to evidence of general character of the accused. 1 Texas Ct. App. 548.

In the present case the court charged the jury, amongst other matters, upon the reasonable doubt, as follows: "If the jury have a reasonable doubt of the guilt of the defendant, George Coffee, they should acquit him." Several special instructions were asked by the defendant, and notably amongst them the following: "That all presumptions are to be indulged in favor of the innocence of a person accused of crime, — the law presuming every person to be innocent until he is proven to be guilty." This instruction was refused by the court, though it nowhere appears in the general charge that the court had instructed upon the presumption of innocence. It is always error for the court to refuse a defendant the benefit of a charge upon the presumption of innocence, when he requests it. Pasc. Dig., art. 3105; *McMullin v. The State*, decided at the present term, and authorities there cited.

For this error, the judgment is reversed and cause remanded.

Reversed and remanded.

JAMES BROWN v. THE STATE.

ESCAPE — JURISDICTION OF THIS COURT — Pending his appeal to this court from the judgment of conviction, and prior to the day assigned for causes from the district, the appellant escaped, and his appeal was dismissed therefor. Subsequently, being apprehended, the court below passed sentence upon him in pursuance of the judgment, and he appealed from the sentence. The attorney-general moves to dismiss the appeal. *Held*, that the jurisdiction of this court over the case was ousted by the escape, and the motion is sustained.

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APPEAL from the District Court of Rusk. Tried below before the Hon. A. J. BOOTY.

The conviction was for assault with intent to murder, and the punishment assessed was two years in the penitentiary.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was tried and convicted, at the July term, 1878, of the District Court of Rusk County, of an assault with intent to murder one Jim Woods, charged to have been committed on August 13, 1872. From that judgment an appeal was taken by the accused to the Tyler branch of this court, and whilst the appeal was here pending and undetermined, it was made known that the appellant had escaped custody and was at large; and thereupon the court, on motion of the then assistant attorney-general, supported by satisfactory evidence of this escape, dismissed the appeal.

At some time afterwards, where or by what means does not appear, the accused is again found in the custody of the law; and the mandate of this court on his appeal having reached the District Court of Rusk County, in which the trial was had, on February 11, 1879, he was brought into open court by the sheriff, and was sentenced in accordance with the verdict and judgment against him, and the court made the following order: "It is therefore ordered by the court that the verdict of the jury in this cause, returned on July 24, 1878, be affirmed, and that the defendant be adjudged guilty of an assault with intent to murder, in accordance therewith, and that he be, and is hereby, condemned and sentenced to confinement, at hard labor, in the penitentiary of the State of Texas for (2) two years;" and

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proceeded to order the removal of the accused to the penitentiary.

To which, the record recites, "the said defendant, by his attorney, excepts, and gives notice of appeal to the Court of Appeals at Galveston, Texas; because, he says, the said defendant, James Brown, appealed from the judgment of this court to the Court of Appeals at Tyler, Smith County, Texas, and was dismissed by said court for reasons set forth in the mandate from said court, having never been adjudicated upon the facts of the cause, and was dismissed by said Court of Appeals some time before the day assigned for taking up causes from this district."

The assistant attorney-general now moves this court to dismiss the present appeal, on the ground that more than one appeal is not authorized by law, and that, the appellant having heretofore appealed from the judgment of conviction, and having forfeited his rights under it by escaping from custody and withdrawing himself from the jurisdiction of the court, he cannot now be heard on another appeal.

We are of opinion that the motion must prevail, under the proviso to article 721 of the Code of Criminal Procedure, as amended by the act of August 21, 1876, p. 217, which is as follows: "*Provided*, that in case the defendant shall make his escape from prison during the pendency of the appeal, then the jurisdiction of the appellate court shall no longer attach in the case; and upon the fact of such escape being made to appear, the court shall, on motion of the attorney-general, or counsel for the State, dismiss the appeal."

The appellant has had the benefit of an appeal, which he has forfeited under the law by escape.

Because this court has no jurisdiction of this appeal, the motion is granted and the appeal is dismissed.

Appeal dismissed.

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H. D. HANNON v. THE STATE.

1. CONSPIRACY—EVIDENCE. —It is a well-settled principle of law that the declarations of one can be used against another, when it is proved that they were engaged in a common enterprise, and that the declarations were made before the act was complete.
2. SAME. — When a conspiracy is shown, the declarations of one conspirator in furtherance of the common design, as long as the conspiracy continues, are admissible against the associates, though made in their absence.
3. SAME. — The least degree of concert or collusion between the parties to an illegal transaction makes the act of one the act of all.
4. EVIDENCE. — The jury are authorized to pass upon the credibility of testimony, and to credit those witnesses who, in their opinion, are best entitled to belief.

APPEAL from the District Court of Erath. Tried below before the Hon. J. R. FLEMING.

The appellant was convicted of the theft of five head of cattle, and his punishment assessed at four years in the penitentiary. The case of J. H. Taylor, referred to in the opinion, will be found *ante*, p. 529.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. In this case, H. D. Hannon was tried for and convicted of theft of five certain cattle, alleged to be the property of T. B. Long. The indictment is in proper form, and the charge of the court was an excellent exposition of the law applicable to the facts of the case. The evidence shows conclusively the theft of the cattle, and that they were the property of T. B. Long.

The first error assigned is, "that the court erred in admitting the testimony, over the defendant's objections, of the witness John Glenn, as is shown by bill of exceptions." It appears from the bill of exceptions that, on the trial of

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the cause, John Glenn, a witness for the State, testified that "some time in December, 1877, J. H. Taylor came to my house and asked me to buy some cattle, consisting of two-year-old steers. I told him that I would buy them if they suited me. He said that there was a friend of his, living below Dublin, in Erath County, who had some cattle to sell in order to pay a land-debt, and that if I wished to buy them he would inform him, and they would bring the cattle to me in eight or ten days. I told him I would buy them if they suited me." To which testimony the appellant objected, upon the ground that such testimony was hearsay, and because it did not appear that the "friend" referred to by Taylor in his conversation with Glenn was this defendant; which objection the court overruled, on the ground that the testimony showed that this conversation with Glenn took place about two or three weeks prior to the time defendant and Taylor delivered the cattle, and showed there was a conspiracy between the parties, and that they were acting together in the commission of the offence, and that these declarations of Taylor in pursuance of the common design were, therefore, competent testimony.

In this ruling of the court we think there was no error. This is another branch of the two cases of *J. H. Taylor v. The State of Texas*, decided at the present term of this court. The evidence also discloses the further fact that, when Taylor and the defendant returned with the cattle, Taylor introduced defendant to Glenn as the owner of the cattle, and that defendant sold the cattle to Glenn, with a lot of other stolen animals, — twenty-two in all. It not being convenient for Glenn to pay for the cattle until the next day, the defendant left early the next morning, going south, saying he was anxious to get back. He authorized Taylor to make the bill of sale and receive the money for the cattle. Taylor, at the time, made his home at the house of defendant. The evidence further shows that defendant had

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no cattle of his own. At the time he sold the cattle to Glenn he said that he had raised a portion of them, and traded for some of them. Before Glenn paid for the cattle, the owners of the same, who were hunting them, arrived, claimed, and took possession of the cattle.

No principle is better settled than that the declarations of one man can be given in evidence against another, when it is proved that they were engaged in a common enterprise, and that the declarations were made before the act is complete.

“When a conspiracy is shown (which is usually inductively from circumstances), then the declarations of one conspirator in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter. The least degree of concert or collusion between the parties to an illegal transaction makes the act of one the act of all.”

2 Whart. on Ev., sec. 1205 ; see also notes 1, 2.

The only remaining assignment of error is that the court erred in overruling the defendant's motion for a new trial, because the verdict of the jury was contrary to the evidence, in this : that the defendant was not identified. This assignment is not well taken. The jury were warranted by the evidence in believing that defendant is the same man who sold the cattle to Glenn. The defendant introduced two witnesses for the purpose of proving an *alibi*. The jury believed the witnesses for the State, in preference to those of the defendant. In this we cannot say they committed an error.

We are of opinion that there is nothing in the entire record which would authorize us to reverse the judgment. The judgment of the District Court is therefore affirmed.

Affirmed.

Statement of the case.

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INDIAN POCKET v. THE STATE.

1. **SPECIAL VENIRE — PRACTICE.** — There is in this State no provision of statute or rule of practice which requires the presence of the defendant or his counsel, in a criminal case, at the drawing of a special *venire*.
2. **SAME — CASE STATED.** — In a murder trial, the jurymen were drawn by a deputy-sheriff from an ordinary cigar-box, with a lid on the side, but not a sliding lid, and the names so drawn were simply recorded by the clerk. *Held*, that section 21 of the jury-law (Acts Fifteenth Legislature, 82) applies more particularly to the organization of juries for the regular weekly panels, and that another and different box than one with a sliding lid may be used in drawing the jury under a special *venire*. The objection that the clerk did not actually and in person, with his own hand, draw the jurors, is purely technical; and against such objection this court will sustain the judgment by purely technical reasons, when the appellant could have suffered no injury. See the opinion *in extenso*, for treatment of these questions, holding that under the proceeding in this case the objections are trivial.
3. **EVIDENCE — CONFESSIONS** made freely, without compulsion or persuasion, are entirely competent, and may, as in the present case, serve both as a confession of guilt and as evidence of the *animus* with which the act was done.
4. **SAME.** — Confessions of a defendant after arrest, he being duly warned beforehand that his statements might be used against him, are admissible in evidence against him.
5. **CHARGE OF THE COURT.** — Though requested charges be unnecessary, they may be sometimes given with propriety; but it is not error in the court below to refuse them when the law applicable to the case is correctly set forth in the general charge.
6. **SAME.** — The court below is not required to repeat, upon request, charges substantially embodied in the general charge, or to charge upon a state of facts which does not exist; but, in the event of a reasonable doubt, it is best that the charge asked, if a proper one, be given.

APPEAL from the District Court of Lavaca. Tried below before the Hon. E. LEWIS.

The indictment was for the murder of Leonard Hyde, in Lavaca County, on February 14, 1878. The conviction was for murder in the first degree.

S. D. Peterson, being sworn for the State, testified that on the evening of February 14, 1878, himself and deceased

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were in the crib of witness, near Hallettsville, Lavaca County, shucking corn. While there, the appellant came to the crib and asked witness to lend him a gun, as he had just seen a drove of wild turkeys outside of witness's field. Witness told appellant to go up to his house, near by, and get the gun. At this juncture, deceased spoke up and said that he would go with appellant and help kill the turkeys. The two went off together towards the house to get the guns, and this was the last that witness saw of either appellant or deceased, until, a short while afterwards, being informed by Pat Boyle that deceased had been killed, he went and found deceased dying, a few steps from the "big gate" of witness's field. Deceased had been shot in the forehead, and his brains were coming out from the wound. He expired a few minutes after witness reached him. About three-quarters of an hour had elapsed since appellant came to the crib on horseback and asked for the gun, and the killing must have occurred about four o'clock, P. M.

Pat Boyle, referred to, was a tenant of witness, and lived in a house situated on the farm, and near the "big gate" alluded to. Deceased, who was a young man of nineteen or twenty years of age, also lived with witness. Witness identified the appellant, and proved the venue in Lavaca County.

Pat Boyle testified, for the State, that he lived in a house near the "big gate" on Peterson's farm, and that on the evening of February 14, 1878, at four o'clock, he saw the deceased and appellant coming along the road, inside the field, from Peterson's house, deceased walking and appellant riding. Witness noticed that appellant had a double-barrelled shot-gun at the time, and saw deceased hand him a pistol. Witness then asked where they were going, and being told that they were after a drove of turkeys seen outside the fence, he remarked that he would go too, as he "wanted to see the fun." Witness joined the deceased, walking along with him behind the appellant. When within

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about forty yards of the "big gate," appellant dropped the gun. He reached down and picked it up; and after riding along about forty yards, appellant suddenly levelled the pistol which he had in his hand, and saying to deceased, "G—d d—n you, if you follow me any further I will kill you," shot deceased, the ball penetrating the forehead. Witness, who was then within ten or fifteen feet of deceased, turned and went rapidly back towards the "big gate." When witness looked back from the gate, he saw appellant starting from the position in which he did the shooting, and saw him as he rode off, until he reached the corner of the field-fence, when he turned east. Witness then went after and returned with Mr. Peterson. They found deceased shot with a bullet through the head, the brains oozing from the wound. He lived but a few minutes after witness and Mr. Peterson reached him. Witness did not see appellant afterwards, until he saw him under arrest, in June, as he (appellant) fled the country. Deceased had no weapon on his person when he was shot.

Mrs. Peterson, wife of the witness S. D. Peterson, sworn for the State, testified that, on the evening of the killing, appellant and deceased came to the house, and appellant asked for the gun, which he said he had borrowed from the husband of witness. The gun was delivered, and the two retired to a little side room, where the shot and powder for loading was carried them by the little son of witness. Witness heard them laughing and talking together, and presently saw them go off together, appellant with the gun and deceased with a pistol, towards the "big gate," appellant riding and deceased walking. Witness observed that the appellant had a pistol fastened to the pommel of his saddle when he rode up. The two had not been gone long before witness heard the report of a gun or pistol; and shortly Pat Boyle came running to the house, and reported that appellant had shot deceased.

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Henry Lemons, a freedman, next testified, for the State, that he lived in the neighborhood of Mr. Peterson when deceased was killed. On that evening, appellant rode up to the house of witness, having with him a gun and two pistols. He shot a dog; and, holding a pistol out in his hand, said to witness, "Do you see this? I have just killed one man with it, and if you listen you will hear it kill another."

John Lafore, a freedman, testified, for the State, that on February 14, 1878, he lived at the farm of Mr. Dud Clark, on Smother's Creek, in Lavaca County. That late on the evening of that day appellant rode up to his house, stopped awhile, fed his horse, and rode off about eight or nine o'clock, having asked directions to the little railroad-town of Flatonina. He told witness that he had killed a young man named Hyde, on Mr. Peterson's place, about four miles distant.

C. S. Hays, for the State, testified that he was constable of Bosque County (precinct No. 1) on June 17, 1878, and on that day arrested appellant. After the arrest, witness called him "Indian Pocket," and appellant said that he had not heard that name in a long time. Witness then read him the proclamation of the governor offering a reward for his arrest, when appellant said, "Yes, I killed that fellow Hyde, and I reckon they will stretch my neck for it when I get down in Lavaca County." Before appellant made this statement, witness warned him that whatever statement he might make about the matter might be used in evidence against him. After the arrest, appellant was conveyed from Bosque to Lavaca County, and lodged in jail.

Here the State rested. Mrs. Smith was introduced by the defence. She testified that, on the day of the killing, appellant came to her house, which is about one mile distant from Peterson's, and wanted to get the pistol of witness's husband. He took the pistol without the consent of witness. Witness gave him dinner. Witness thought him

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drunk, as he fell down twice on the steps. He behaved, otherwise, very politely, and did nothing else objectionable. He used no improper language. Appellant left the house of witness about two or three o'clock, going towards Mr. Peterson's house.

Mr. Brown, for the defence, testified that at the time of the killing he lived near the town of Hallettsville. On that evening, about one or two o'clock, he saw appellant coming along the public road, running his horse and hallooing. Witness had never seen him so conduct himself before, and judged that he was drunk, though he was not near enough to know it.

Frank Edwards, a freedman, was next introduced by the defence, and testified that, on the day of the killing, the appellant came to the house where witness was living. He got into a difficulty with the women, and was misbehaving himself. He did many improper things, such as cutting up the bed-clothing, knocking the bottoms out of tubs, etc. Witness asked him to quit; at which he got mad, and witness knocked him down. He went off then, threatening to come back and kill witness. He had a bottle of whiskey in his pocket. He drank the whiskey, and threw away the bottle as he left. Witness thought he was drunk. He was much excited and enraged when he went away.

Jane Dare and Catherine King, freedwomen, corroborated the testimony of the witness Edwards, except that the latter testified that she did not hear appellant threaten to get a gun and kill Edwards,—a threat which, if made, witness would have heard. Jane Dare adds, that while she thought appellant drunk, that he was not so drunk that he did not know what he was doing.

S. D. Peterson and Mrs. Peterson testified for the State, in rebuttal, that when they saw appellant, — the one at the crib, when he asked for the gun, and the other at the house, when it was delivered to him, — they discovered no evidence

Argument for the appellant.

of intoxication. Appellant was cheerful, laughing, and polite, and if drunk, displayed no evidence of it.

W. H. Crain, for the appellant. On the first day of the February term, A. D. 1879, of the District Court, on motion of the county attorney, a *venire* of sixty men was ordered to be drawn. A common cigar-box, with a lid upon the top, held the slips upon which the names of the jurymen were written.

Under the direction of the judge, in open court, Pleasant Green, a deputy-sheriff, proceeded to draw the names, and as each was drawn he announced it to the clerk, who wrote it down.

Neither the defendant nor his counsel was present, nor had they been notified to be present. The list of names drawn was appended to the writ and delivered to the sheriff. When the case was called for trial, the defendant presented his exceptions to the special *venire*; which were overruled, and an exception saved to the ruling of the court.

Defendant contends that, as the bill of exceptions shows, he was confined in jail, and was not present when the *venire* was drawn; that neither he nor his counsel was notified when the drawing would take place; and that, as there was no waiver of this right, the judgment of the court should be reversed. In support of this proposition, he cites the case of *Gibson v. The State*, 3 Texas Ct. App. 438 *et seq.*, where it is held that, unless waived, the defendant's right to be present when his motion for a new trial is heard cannot be denied him. Certainly he is equally, if not more, interested in the drawing of the jurors who are to try him for his life.

If a defendant in a misdemeanor case, even, were denied the right to be present at the drawing of the jury, his conviction could not be sustained. Does not this rule apply with greater force in a capital case?

Argument for the appellant.

The defendant further suggests that one important requirement of the jury-law of 1876 was wholly disregarded, in this: that the box used in drawing the jurors was not such a box as is provided for in the law, viz., a box with a sliding lid. If this provision of the law can be violated, why enact it, and why use a box at all? A common hat would be equally as useful as a cigar-box.

The object of this provision seems to be, that the entire list of names shall be selected by lot; that no name shall be seen till drawn; and that when the clerk draws a name, he shall slide the lid back while he writes the name down, and then shall reopen the box to draw another, thus proceeding till the number required shall have been drawn.

In connection with this objection, it may be well to consider the objection raised by the defendant to the drawing of the special *venire* by any other person than the clerk of the court. The law provides that the drawing shall be done by the clerk, in open court. In this case it was done by a deputy-sheriff.

It is true that the district judge considered that the mode of drawing was a substantial compliance with the statute, as appears from his explanation given in signing the bills of exceptions. But defendant urges that *a drawing actually done by a deputy-sheriff and recorded by the clerk is not, either wholly or substantially, a drawing done by the clerk.*

It could with equal force be claimed that the drawing was done by the judge, assisted by the deputy-sheriff. The clerk was not the *actor* in the drawing. He was merely the *recorder* of the *act* of the deputy-sheriff. The box lay open, and the deputy-sheriff, as he drew a name, announced it, and the clerk wrote it down. Can this be regarded as a compliance with the law? Defendant thinks not.

The case of *Monroe Harrison*, 3 Texas Ct. App. 558, was reversed, partly because the court ordered seventy-five men to be drawn for the special *venire*; and yet this order

Argument for the appellant.

of the court would seem to enure to the advantage of the defendant.

“A jury formed in any other manner than as prescribed by the act [Act Fifteenth Legislature] is not a legal jury, and a conviction before any jury not organized in accordance with the statute, if taken advantage of at the proper time and in the proper manner, must, in a case of felony, be set aside on appeal.” *Elkins v. The State*, 1 Texas Ct. App. 540.

In the case of *Hicks v. The State*, decided at the present Galveston term, *ante*, p. 488, in regard to the failure of the County Court to swear the sheriff at the commencement of the term, the court use this language:

“A court would have as much right to ignore and disregard any other section of the law as this.” And in the same case the court, quoting from *Shackleford v. The State*, 2 Texas Ct. App. 385, say: “When the Legislature prescribes rules for the selection of juries, and repeals all laws and parts of laws in conflict with the provisions of the act [to which we have referred], *the courts must observe the law in force.*”

Is not the provision of the law requiring the clerk to draw the special *venire* in open court as essential a safeguard for the protection of a defendant charged with a capital offence as that provision which requires the court to administer the oath to the sheriff?

And if the failure of the court in this particular caused the reversal of a case of simple misdemeanor, ought not the failure of the clerk to draw the special *venire* to be considered of sufficient importance to authorize a reversal in a case in which the defendant's life is involved?

In the case of *Hasselmeyer v. The State*, 1 Texas Ct. App. 700, the objection was urged for the first time in the motion for a new trial, that the jury had been drawn by the judge, instead of the clerk; and the court held that the ob-

Argument for the appellant.

jection came too late, but should have been presented when the drawing took place.

This case, however, differs from Hasselmeyer's in this particular: that the former is a capital case, the latter an ordinary felony. In the case before the court, defendant could not object to the mode and manner of drawing the names to be summoned by virtue of the special *venire*, *because he was in jail*, and had not been ordered by the court to be brought into court to witness the drawing; nor was his counsel present, or notified by the court to be present, at the drawing, as will appear by reference to the bill of exceptions; nor does defendant admit that a notification to his counsel would operate as a waiver of his right to be present.

It could be well argued, had the court caused defendant to be brought into court during the drawing, that the objection to the mode and manner of drawing should have been then and there presented; *but when it appears that the court denied the defendant his right to be present at the drawing*, thereby preventing him from urging objections to the mode and manner thereof, it would be the quintessence of judicial cruelty to hold that the defendant should have presented his objections to the mode of drawing at the time the drawing was done. The court would, in that case, first deny him the right to be present at the drawing, and then punish him because he was not present.

The able judge who presided at the trial states in the bills of exceptions that there was not any notification given to defendant's counsel, other than the public notice that the drawing would take place at a certain time. Were this to be regarded as notice to the defendant or his counsel, still the latter could not have objected to the mode of drawing, because an attorney cannot represent a defendant in a felony case, in his absence, unless his right to be present is waived expressly or by implication.

Argument for the appellant.

The very object intended by the requirements of the common law, followed by our superior tribunals upon this subject, is that the inferior court may have an opportunity to remedy the evil complained of, and that the defendant may save exceptions to the action of the court in case the remedy is not applied.

It is urged, therefore, in behalf of defendant, that he should have been permitted to be present when the drawing of the jurors took place; and that, having been absent in jail, he could only except to the mode and manner of the drawing at the first opportunity which offered, viz., when his case was called for trial. *Long v. The State*, 4 Texas Ct. App. 85.

The defendant, moreover, contends that the definition of murder contained in the first instruction to the jury is incorrect, in this: that it states that murder is distinguishable from every other species of homicide except that which would make the offence manslaughter; and that the court erred in charging that all murder committed in the attempt at the perpetration of arson, rape, robbery, or burglary is murder in the first degree, as this part of the charge was not applicable to the facts; and it is equally as erroneous to give an instruction inapplicable, as to fail to give one that is applicable.

It was a question material to be submitted to the jury, whether the defendant's mind was sedate and calm, and whether he formed a cool, deliberate design to kill deceased while his mind was in that state. Defendant showed by his witnesses that shortly before the homicide he was drunk; and that his mind was enraged from a severe blow received from one Edwards, which knocked him down; and that while in that frame of mind he went in the direction of Mr. Peterson's, where the homicide was committed.

True it is that Peterson and wife testified that defendant did not seem to be drunk, but the conflict of testimony

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should have been reconciled by the jury, under pertinent charges upon the subject, and not by the judge.

The court not only failed to charge upon this question, but refused to give the instructions asked by the defendant.

In the case of *Wasson v. The State*, 3 Texas Ct. App. 481, the court say: "It is the duty of the court to charge the law applicable to the facts, and whenever *there are facts that would influence a jury, in any reasonable probability*, it is the duty of the court to submit the law in charge which is pertinent to those facts."

It is respectfully submitted, in behalf of defendant, that the charge of the court in this case was not calculated to call the attention of the jury to the material questions presented by the testimony for their consideration, but would be equally as applicable to any case of murder that might be called for trial in any court in the State, being merely a dissertation upon the abstract question of murder and its distinctions.

Thomas Ball, Assistant Attorney-General, and *J. R. Burns*, for the State.

WHITE, J. In this case, the appeal is from a judgment of conviction for murder in the first degree. Appellant was charged in the indictment with having, on February 14, 1878, murdered one Leonard Hyde, in Lavaca County. He was arraigned and tried on February 11, 1879. Counsel was assigned him by the court, and, as shown by the record, conducted his defence with marked ability on the trial below, whilst in this court they have also appeared by printed briefs in his behalf, distinguished alike in force of argument and commendable zeal for a gratuitous and unfortunate client.

Many questions are raised as to the correctness of the proceedings on the trial, all or most of which are reca-

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pitulated in the fifteen different grounds enumerated in the assignment of errors. We do not propose to discuss them *seriatim* or in whole, but only such as in our judgment are most pertinent and important, or novel in character.

1. Two preliminary questions are made with reference to the special *venire*, which were submitted in a motion to quash, which, technically speaking, was a challenge to the array. First, that neither defendant nor his counsel was notified or present in court when the *venire* was drawn; and, secondly, that the special *venire* was not drawn in conformity with the requirements of the statute. Two reasons are assigned for this latter objection, viz.: that the box from which the names of the jurymen were drawn was not such an one as the law provides shall be used for such purposes; and that the names were not drawn from the box by the clerk, upon whom alone the law imposes that duty.

With regard to the first proposition, we are aware of no provision of statute or rule of practice which confers upon a defendant or his counsel in a capital case the right to be present at the drawing of the special *venire*. True, in some of the States—as, for instance, in Alabama—the court, while not expressly deciding that it was necessary, have held that the personal presence of the prisoner at such time would be the safer practice. *Henry v. The State*, 33 Ala. 389; *Hall v. The State*, 40 Ala. 698, and authorities cited. We are not disposed, even if necessary, to controvert the proposition that the practice would be “a safer one;” as, indeed, would be the personal presence of the prisoner whenever any step is taken in his case. What we hold is, that such right is nowhere conferred by statute; and, in our opinion, under the provisions of the present grand-jury law with regard to special *vinires*, it cannot well be perceived how his presence or absence could affect any apparent right of his in any appreciable manner. Acts Fifteenth Legislature, 82, sec. 23.

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Under the old law, "the challenge to the array" was allowed in and limited to cases where the officer had acted corruptly in summoning the jury. Pasc. Dig., art. 3034. That was at a time when the whole selection of the *venire* was confided, in a great measure, solely to the officer executing the writ. Now such chances for corruption under the present system must be rare indeed, and confined almost exclusively to cases where talesmen are summoned to supply deficiencies. The authorities cited by counsel, upon this proposition, are not analogous. Our statute provides the method by which a defendant is notified of the names of persons summoned on a special *venire*. Pasc. Dig., art. 3022.

With regard to the second proposition, the facts were that the box from which the names of the jurymen were drawn was an ordinary cigar-box, with a lid on the side, but not a sliding lid; and the names of the jurors were drawn from this box by one Green, who was a deputy-sheriff, in the presence of the judge, in open court, whilst the clerk simply recorded the names so drawn. The section of the statute upon which the first point is predicated is section 21 of the jury-law, and reads: "The clerk shall write the names of all the jurors entered of record, on separate slips of paper, as near the same size and appearance as may be; and when a jury is wanted for the trial of any case, the same shall be drawn from a box, after the slips of paper above mentioned shall have been deposited therein and mixed. The clerk shall provide and keep for that purpose a suitable box, with a sliding lid." Acts Fifteenth Legislature 82. This box, we take it, was intended more especially for ordinary use when the names of jurors on the weekly panels were to be drawn. Sec. 20. In section 22, providing for ordinary jury trials, the language is, "the clerk shall draw from *the box*." In section 23, providing for special *venires*, the language is, "and the tickets be placed *in a box*, which shall be well shaken up, and from *this box* the clerk, in the

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presence of the judge, in open court, shall draw the number of names required for said special *venire*," etc.

This language, it would seem, indicates clearly that the box to be used on occasions of special *venires* may be another and different box from the one with a sliding lid provided for ordinary juries. If so, then the structure or make of this latter box is not prescribed, and an ordinary cigar-box, with any kind of a lid, might answer the purpose. Where no injury is shown to have been done, and not much probability that an injury under the circumstances could have been done, this court will avail itself of strictly technical reasons to support and sustain the action of the court below against mere technical objections. *Johnson v. The State*, 4 Texas Ct. App. 269; *The People v. Brotherton*, 47 Cal. 388. The other objection, that the clerk did not actually in person, with his own hand, draw from the box the names of the jurors, as shown by the facts, is of the same character, and purely technical. In *Hasselmeier's Case*, 1 Texas Ct. App. 690, the question, though raised, was not decided, because not taken advantage of at the proper time. That was the first instance, so far as we remember, in which the point was made. In several of the other States, under statutes of similar character to ours, analogous questions have been adjudicated.

In *Carpenter v. The People*, 64 N. Y. 483, it was held that "a challenge to the array of petit jurors at a Court of General Sessions for the city and county of New York alleged that the jurors were not selected by the commissioner of jurors of said county, and that neither he nor any one on his behalf attended the drawing; but that the jurors were selected by one appointed by the mayor as commissioner, and that the statute under which the mayor acted was unconstitutional. *Held*, that the challenge showed upon its face that the jury were selected by an officer *de facto*, whose acts, in the exercise of the functions of the office, were valid as to the public, and whose appointment could

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not be questioned collaterally; and that, therefore, a demurrer to the challenge was properly sustained."

In *Hunt v. Mayo*, 27 La. An. 197: "Under the act of 1868, Revised Statutes, 2127, the requirement was that the jury must be drawn by the parish judge, clerk, and sheriff. The drawing for the term was made by the parish judge, clerk, recorder, and the sheriff. Therefore, all the officers required by law to draw the panel were present, and officiated in the act. The placing in the order of the judge, for the drawing at that term, the additional officer — the recorder — was doubtless an oversight, and may be regarded as surplusage. *Held*, the objection to the drawing has no weight."

In *Mapes v. The People*, 69 Ill. 523, it was held: "When the office of county clerk was divided in a county, the fact that a person acting as county clerk for mere county matters assisted in the drawing of a jury, instead of the clerk who attended to the business of the court in probate and other matters, was regarded as no ground for a challenge to the array, he being *de facto* a county clerk, and the objection was considered trivial." In the opinion the court further say, in this latter case: "We are not inclined to regard with favor mere trivial objections, interposed for no other purpose than to obstruct the administration of the law."

So, in the case under consideration, the object, spirit, and intention of the law — which is, to secure a fair and impartial jury — was not, so far as we can see, violated. The drawing was done in open court, in the presence of the judge, from a box with a lid upon it, and the names were recorded as drawn, by the clerk. How the defendant could possibly have been injured in any manner by the fact that the deputy-sheriff drew the names from the box cannot be perceived. *Ray v. The State*, 4 Texas Ct. App. 454.

2. Another objection assigned as error is, that the court improperly admitted in evidence the confessions of the defendant. Shortly after the murder, defendant said to

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the witness Lemons, holding his pistol in his hand, "Do you see this? I have just killed one man with it [the pistol], and if you listen you will hear it kill another." This confession was made freely, without compulsion or persuasion, and was entirely competent, both as a confession and as evidence of the *animus* with which the act was done. Pasc. Dig., art. 3126. "Acts and admissions, or other language of the prisoner, even after the mortal stroke or killing, may often be pertinent evidence tending to show express malice at the time of the killing." *The Commonwealth v. Jones*, 1 Leigh, 670; *McCoy v. The State*, 25 Texas, 33.

Again, when the defendant was arrested, in Bosque County, by Hays, a constable of that county, that officer, who was a witness, testified that "defendant said, 'Yes, I killed that fellow Hyde, and I reckon they will stretch my neck for it when I get down in Lavaca County.' Before he made this statement, I warned him that whatever statement he might make about this matter could be used in evidence against him." Under the provisions of our statute with respect to confessions made after arrest, this testimony was perfectly legitimate. Pasc. Dig., art. 3127.

3. The charge of the court, whilst not as elaborate as, perhaps, it might have been, embraced the law applicable to the facts proven. Some of the number of special charges asked by defendant's counsel might with propriety have been given; but we cannot say that they were essential, or tended to present the law as applicable to the facts directly connected with the homicide more correctly than as it was set forth in the general charge. A district judge, it is true, is not bound to repeat charges already substantially given, or to charge upon a state of facts which, in his opinion, do not exist; but it is a safe rule that, whenever a reasonable doubt might arise as to the applicability of the instructions asked to the facts adduced on trial, the court should rather

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give the instruction, if a proper one, than have the case subjected to the risk of a reversal for the want of such a charge. And oftentimes a failure to do so necessitates, uselessly, a discussion of questions which the district judge should not have permitted the record to become encumbered with.

All the evidence sought with regard to defendant's intoxication was permitted to be introduced by him, to prove the mental *status*, and the court did charge the jury fully upon murder in the second degree. *Colbath v. The State*, 4 Texas Ct. App. 76.

We are of opinion that the charge was a sufficient presentation of the law applicable to the case. All the witnesses who testified to the acts, appearances, conduct, and conversation of the defendant at the time of and just immediately preceding the killing, stated that, in their opinion, defendant was sober; or, rather, that he exhibited no indications of intoxication.

This disposes of all the material questions complained of as error. With reference to the other errors assigned, we do not think them well taken, and therefore not necessary to be considered in this opinion.

The facts exhibit a wanton, reckless, unprovoked taking of human life, under circumstances which disclose a total want of motive, much less of justification or excuse. Why the defendant should have shot down the deceased as was done, — a young man going with him upon a hunt, in all the confidence of friendship, — without a word of difference or controversy having taken place between them, is one of those unaccountable circumstances which sometimes occur to startle us with its enormity, and impress us with the fiendish malignity of a heart fatally bent upon mischief. His subsequent boastful declarations fully evince the character of the malice which actuated the foul deed. His flight is a circumstance exhibiting his own consciousness of his guilt.

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And his statement to the officer who arrested him, — “I killed that fellow Hyde, and I reckon they will stretch my neck for it when I get down in Lavaca County,” — was not only confession of guilt, but also a just condemnation of himself to the gallows for his crime.

We have been unable to see a single material error in this record for which we would be warranted in interfering with the verdict and judgment rendered in the court below, and the judgment is therefore affirmed.

Affirmed.

GEORGE TAYLOR v. THE STATE.

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1. VERDICT. — Neither bad spelling nor faulty grammar vitiates a verdict if the sense is clear. But if the sense of a verdict of conviction be not clear, it cannot be permitted to stand.
2. SAME. — There is no such word as “guilty;” and a verdict which finds the accused “guilty” is not a compliance with the statutory requirement that the jury “must find that the defendant is either guilty or not guilty.” “Guilty” is not equivalent to or *idem sonans* with the word *guilty*.
3. PRACTICE IN THIS COURT. — A verdict, as set out in the original transcript, found the appellant “guilty,” and solely for this cause the conviction was reversed by this court. At a subsequent day of the term the assistant attorney-general moved for a rehearing, and for a *certiorari* to bring up a more perfect record, alleging that the original transcript falsified the record, and that the verdict had been tampered with by changing the word *guilty* to “guilty.” This court allowed the motion, and the transcript brought up by the *certiorari* shows that the verdict found the appellant “guilty.” And the entire record being revised, and no error found, the judgment of conviction is affirmed.

APPEAL from the District Court of Montague. Tried below before the Hon. J. A. CARROLL.

The conviction was for threatening to take the life of L. McCurry, and the punishment was assessed at three years in the penitentiary. It will be observed that two opinions were rendered in this case, and a final disposition of it made on a rehearing allowed the State.

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J. G. Quigley, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. In this case appellant was indicted, tried, and convicted under articles 6585 and 6586, Paschal's Digest, for seriously threatening to take the life of one L. McCurry.

There is but one question presented in the record which it is deemed necessary to discuss, and that is the certainty and sufficiency of the verdict as rendered by the jury. As we find it in the record, and we take it that it is copied correctly, since this was also one of the grounds of the defendant's motion for a new trial, the verdict reads thus: "We, the jury, find the defendant *guilty*, and assess his punishment to confinement in the penitentiary for three years."

It is contended that this verdict does not conform to the statutory requirements, and is consequently insufficient and invalid. The statute referred to is in these words: "The verdict in every criminal action must be general; when there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such plea are either true or untrue; where the plea is not guilty, they must find that the defendant is either '*guilty*' or '*not guilty*;' and, in addition thereto, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty." Pasc. Dig., art. 3091.

This language, it will be observed, with regard to the character of the verdict,—that is, that "they [the jury] must find that the defendant is either '*guilty*' or '*not guilty*,'"—is imperative. Have the jury performed this duty in the case under consideration? Is the word "*guilty*" synonymous with or equivalent to the word "*guilty*?" Is it *idem sonans* with the word "*guilty*?" Is there such a word as "*guity*" belonging to or having a definition in the English

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language? We are compelled to answer each of these questions in the negative.

In *Koontz v. The State*, 41 Texas, 570, it was correctly stated to be the true rule that “bad spelling will not vitiate a verdict, where it has the requisites of being certain and intelligible.” In that case the verdict was, “We, the jury, find the defendant *guilty* as charged in the indictment, and assess his punishment at confinement in the State penitentiary for a *turm* of *too* years.” This verdict, “though not a good specimen on the question of orthography,” was held to have the two essentials of certainty and intelligibility, and to be one which “could not be misunderstood.”

And so, in Krebs’s case, this court held that the verdict, in these words, “We, the juror, find the defendant guilty, and *sess* his punishment *deth*,” however “obnoxious in spelling and style,” was, notwithstanding, an intelligible verdict in a murder case. 3 Texas Ct. App. 348. Indeed, it may now be stated as a general rule that neither bad spelling nor ungrammatical findings of a jury will vitiate a verdict when the sense is clear. *Bland v. The State*, 4 Texas Ct. App. 16; *Pepper v. Harris*, 78 N. C. 71; *Hart v. The State*, 38 Texas, 382.

Another rule is, that “verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice.” *Lindsay v. The State*, 1 Texas Ct. App. 327, citing *Pickett v. Pickett*, 2 Bibb, 178; *Mays v. Lewis*, 4 Texas, 38; 1 Gra. & Wat. on New Tr. 159.

The converse of these rules is equally true, to wit, that where the sense is not clear — where there is doubt of the import of the language used — the verdict, especially in a criminal case, cannot be permitted to stand. It is of vital importance to the validity of a conviction in a criminal case

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that the verdict *must find the defendant* "guilty." If, in attempting to perform this duty, through accident or misadventure, or from whatever cause, the jury fail to do so, the failure or omission, or whatever it may consist in, on their part, cannot be supplied by intendment, if the language they have seen fit to use is senseless, unintelligible, or of doubtful import. *Shaw v. The State*, 2 Texas Ct. App. 487; *Harvey v. The State*, 2 Texas Ct. App. 504; *Dillon v. Rogers*, 36 Texas, 152; *Keeler v. The State*, 4 Texas Ct. App. 527.

Because the verdict does not find the defendant "guilty," the judgment of the lower court must be reversed, and the cause remanded for a new trial.

[The foregoing opinion was rendered January 29, 1879. On the ensuing 10th of February, the assistant attorney-general moved for a rehearing and a *certiorari*. This motion elicited a second opinion, by which the case was finally disposed of, and which discloses all matters of fact of any significance. — *Reporters*.]

WHITE, J., on motion for rehearing. In the opinion delivered by this court in this case on January 29, 1879, the judgment of the lower court was reversed solely upon the ground that the verdict of the jury was insufficient, in that it did not find the defendant *guilty*. By the transcript of the record as then before us, and particularly from the fact that defendant's counsel, in an amendment which was written just below his signature to the motion for a new trial, and which was based upon the fact that the jury did not find defendant guilty, it was a natural conclusion upon our part that the verdict was indeed "guilty," as it appeared in the record, and that the amendment to the motion for a new trial aforesaid had called the District Court's attention directly to that fact before the motion for

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new trial was overruled. And we must confess that we were surprised that the motion should have been overruled; or, to say the least of it, if the amendment was called to the attention of the court, and there was any doubt or ground for supposing, really, that the verdict was “guilty,” and not “guilty,” that some explanation was not made which would have tended to settle or throw light upon the matter.

On February 10, 1879, the assistant attorney-general filed in this court his motion for a rehearing in behalf of the State, and for a *certiorari* to bring up a more perfect and complete record in the case. In substance, the grounds of this motion were that the transcript upon which the cause had been decided by us was not a true record of the proceedings had in the District Court of Montague County; that the counsel for the State was informed and believed that the original verdict of the jury had been tampered with and mutilated by some one, and the word “guilty” in the verdict changed to “guity,” as was also done in other portions of the record, after the transcript was made out.

This motion was resisted by the defendant, who filed as an exhibit to his answer the affidavit of M. D. Herbert, ex-district clerk, who had prepared the transcript before the expiration of his term of office. He states that he “had written the word *guilty* in the verdict of the jury, but upon suggestion of defendant’s counsel, and upon examination of the verdict as written by the foreman of the jury, finding the word spelled *guity*, he erased ‘guilty’ and wrote ‘guity’ as it appears in the verdict, and as near a *fac-simile* of the word as possible; that [the transcript as made out by him was adopted by his successor] said erasure and correction was made before the certificate of the clerk, or his seal, was attached to said transcript.”

The motion of the assistant attorney-general was sustained and a rehearing granted, a *certiorari* to perfect the

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record being also awarded. In obedience to this writ of *certiorari* a new transcript has been sent up, and is now before us. It is certified by the clerk to be "a true copy of all the proceedings in case No. 745, wherein the State of Texas is plaintiff and George Taylor is defendant, as appears of record." In this record, where the verdict of the jury is set out, the word used by the jury in their findings is certified to be "*guilty*."

We must presume, from all the circumstances stated above, that the transcript as sent up in obedience to the *certiorari* is correct, and speaks the truth with regard to the matter.

So presuming, we have again examined the case with reference to the supposed errors complained of as shown by defendant's bills of exception, if they can be considered as such, and his motion for new trial, and we cannot perceive that any of them are well taken. Defendant, for aught that appears, was fairly and impartially tried, and justly and legally convicted; and so believing, the judgment of the lower court finding him guilty and assessing his punishment to confinement in the penitentiary for a term of three years is in all things affirmed.

Affirmed.

LIGHT TOWNSEND v. THE STATE.

1. PRACTICE. — In the entry upon the minutes of the court of the presentment of the indictment, the offence of which the accused was charged was omitted. The court, at a subsequent term, upon the motion of the county attorney, permitted the record to be amended in this respect *non pro tunc*. *Held*, correct.
2. SAME. — Even an indictment or an information may be amended in matters of form.
3. CONTINUANCE. — Attachments for witnesses were sued out over two months before the application for a continuance; the return was "not executed," but was without date. *Held*, that diligence is not shown.

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4. **SAME.** — The accused, under the impression that the principal witness for the State would not be present at that term of court to testify against him, announced ready for trial. There having been no fraud or deception practised upon the accused which could operate as a surprise, the appearance of the witness did not entitle him to a continuance.

APPEAL from the District Court of Lavaca. Tried below before the Hon. E. LEWIS.

The opinion discloses the case.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Appellant and one Frank McMullen were jointly indicted for theft of a gelding. They severed, and on the trial of this case appellant was found guilty, and condemned by the verdict and judgment to seven years in the penitentiary.

The first error assigned is the overruling of defendant's motion to quash the indictment. This motion was based upon the ground that the entry of the fact of presentment of the indictment upon the minutes of the court was defective, in that it did not state the offence charged, viz., "theft of a gelding." Pasc. Dig., art. 2858; Gen. Laws Fifteenth Legislature, 8.

Upon motion of the county attorney, the court permitted the record to be amended in this regard *nunc pro tunc*. In this the court did not err, but followed the correct rule of practice in such cases. Even an indictment or information may be amended in matters of form, by express provision of our statute, which reads that "when the exception to an indictment or information is merely on account of form, the same shall be amended if decided to be defective, and the cause proceed upon such amended indictment or information." Pasc. Dig., art. 2977; 25 Texas Supp. 207; 44

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Texas, 376. Much greater reason is seen why mere failures or omissions to make proper entries by the clerk could and should be corrected. As was said in *Hill's Case*, 4 Texas Ct. App. 559, "amendments of this character are permissible under the law, and have been recognized by this court if made at the proper time and in the proper manner, and it is not perceived why omissions of the kind here mentioned should not be supplied, or erroneous entries corrected, so as to conform the record to the facts as they really exist, so that the record shall speak the exact truth in every particular." See also *Vestal v. The State*, 3 Texas Ct. App. 648.

The second error complained of is the overruling of defendant's application for continuance. If otherwise good, the motion does not show proper diligence. Attachments for the witnesses were sued out on November 23, 1878, and returned by the sheriff of Goliad County not executed. When this return is dated is not set out. We have the right to presume that the sheriff did his duty and acted promptly. The application was made February 7, 1879, over two months after the attachments issued, and no additional steps were taken by defendant to procure the attendance of the witnesses.

So far as the other ground for continuance is concerned, it is not available for defendant. He claims that he had announced ready for trial the day before, when his co-defendant, McMullen, was tried, on the belief that the principal State's witness, George W. Smith, by whom alone want of consent to the taking of the animal could be proven, was absent and would not be in attendance upon the trial; that he was surprised at Smith's appearing and testifying against his co-defendant, McMullen. The affidavit of the county attorney, disclosing what transpired between himself and counsel for defendant with regard to the witness Smith, shows that defendant had no just grounds to rely upon the fact that Smith would not be present to testify. No decep-

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tion or fraud was practised upon him ; but, on the contrary, he seems to have exercised his own unbiased judgment in the matter, and has no more right to claim that he was surprised than he had in the first instance to presume that Smith would absent himself.

Defendant's guilt is most clearly established by the evidence before us. Several parties saw him, at different times and places, with the gelding in his possession, recently after it was stolen. He went under an assumed name. When he ascertained that he was about to be arrested, at the time the animal was recovered for the owner, he escaped from a window of the house, and in his flight was shot at and wounded.

The law of the case was properly presented in the charge of the court, and no additional instructions were asked. There is no error in the judgment, and it is affirmed.

Affirmed.

FRANK McMULLEN v. THE STATE.

PRESUMPTION OF INNOCENCE — CHARGE OF THE COURT. — That the defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence is a well-settled principle of law, and a statutory right in this State; and when the court is asked to give it in charge to the jury, it is error to refuse so to do because the general charge instructs the jury upon the reasonable doubt.

APPEAL from the District Court of Lavaca. Tried below before the Hon. E. LEWIS.

The opinion sufficiently states the case. The indictment and conviction were for theft.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

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WHITE, J. On the trial below, appellant asked the court to charge the jury "that the law presumes every defendant in a criminal prosecution innocent until his guilt is clearly established by the evidence; and in case you have a reasonable doubt of the defendant's guilt, you will acquit him." This instruction the court refused to give, because, as stated in his memorandum, he had substantially given it in the general charge. All that we have been able to find in the general charge bearing upon the subject is contained in the seventh paragraph, in these words: "If the jury, after considering all the evidence and circumstances testified to by witnesses, shall have any reasonable doubt of the guilt of the defendant, or any reasonable doubt as to whether he knew that the said gelding was being stolen, if the same was stolen, then they should acquit him."

It will be seen that the court does not instruct the jury upon *the presumption of innocence*, though he does instruct them upon the reasonable doubt.

Our statute, which is almost in the very words of the special charge asked by defendant, *supra*, reads: "A defendant in a criminal cause is presumed to be innocent until his guilt is established by legal evidence, and in case of reasonable doubt he is entitled to be acquitted." Pasc. Dig., art. 3105.

Defendant was entitled to have his charge given. The law confers upon him the right to the presumption of innocence, when asked, as much as it does to the reasonable doubt. 2 Burrill on Cir. Ev. 58, 59. So far as this court is concerned, repeated decisions have settled the question of this right, and experience not only confirms us in the correctness of our decisions, but also in the wisdom, justice, magnanimity, and humanity of the law which affords these two inestimable boons of mercy and protection to those charged with the commission of crime. *Black v. The State*, 1 Texas Ct. App. 369; *Preismuth v. The State*, 1 Texas Ct. App.

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480 ; *Hampton v. The State*, 1 Texas Ct. App. 652 ; *Treadway v. The State*, 1 Texas Ct. App. 668 ; *Blake v. The State*, 3 Texas Ct. App. 581.

Because the court erred in refusing to give in charge to the jury the instruction asked by defendant, or some similar instruction embodying the same principle of law, the judgment rendered below is reversed, and the cause remanded for a new trial.

Reversed and remanded.

BARNES PARKER v. THE STATE.

- 1 HABEAS CORPUS. — Neither the sufficiency nor validity of an indictment, nor the constitutionality of a law upon which an indictment is based, are questions which can be appropriately presented by or through the writ of *habeas corpus*. Before indictment, the rule seems to be otherwise.
- 2 BAIL. — The courts are not authorized to discharge a defendant without bail after an indictment has been found.

APPEAL from the District Court of Burnet. Tried below before the Hon. W. A. BLACKBURN.

The opinion sufficiently discloses the case.

B. Coopwood, for the appellant. The application for the writ states unlawful restraint, setting out four pretended indictments, and the *capiases* in each case, as the authority under color of which appellant is so restrained, and avers that neither of these indictments charges any offence.

The sheriff's return sets up the same *capiases*.

On the hearing, appellant read in evidence, without objection, each of the four original indictments, to show that no offence was charged, and then offered in evidence the original deed upon which the indictments are based, offering to prove that the same was the act of W. T. Bacon,

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therein named and described as the grantor; which was objected to by the State on the ground of irrelevancy, and the objection sustained.

Appellant then offered in evidence the two land certificates, upon the filing of which the other two indictments are based, offering to prove that they were legal and genuine; which was objected to on the ground of irrelevancy, and the objection sustained.

Judgment was rendered remanding, with bail fixed at \$2,500 in each of the four cases.

The indictment in one case charges the uttering of a deed, setting it out, and that in another charges that appellant encouraged and advised W. T. Bacon to make this deed; and neither of these indictments avers that it purports to be the act of another, but they both allege he executed it, "transferring and conveying" the land, and neither negating his right so to do.

Each of the other two indictments alleges a file, location, and demand for survey, setting it out, made by virtue of a land certificate issued by the commissioner of the land office, and alleges a prior appropriation of the land so filed on, by a certificate issued on May 10, 1840.

The indictment must be for an offence known to law. *White v. The State*, 22 Texas, 608; *The State v. Houston*, 12 Texas, 245; *Hewett v. The State*, 25 Texas, 725.

And the statute cannot be extended to cases not plainly and unmistakably within its terms. *Shanks v. The State*, 25 Texas Supp. 340; *United States v. Morris*, 14 Pet. 694; *United States v. Williams*, 5 Wheat. 76; *United States v. Sheldon*, 2 Wheat. 119; *United States v. Clayton*, 2 Dill. 219; 6 Wall. 397.

The act of July 28, 1876, does not change or affect the definition of forgery. *Ham v. The State*, 4 Texas Ct. App. 645.

There was no tribunal with authority to issue land certifi-

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cates in Texas on May 10, 1840, and such issued then are mere nullities. Pasc. Dig., art. 4133; *Linn v. The State*, 2 Texas, 319; Const. 1845, art. 11, sec. 1; Const. 1876, art. 13, sec. 5, and art. 16, sec. 18.

The power to require bail is not to be used in such manner as to make it an instrument of oppression; and the nature of the offence and the circumstances under which it was committed are to be considered. Pasc. Dig., art. 2740.

There being no offence whatever charged against appellant, the pretended indictments are not such in law or fact. Pasc. Dig., art. 2862; *Hewett v. The State*, 25 Texas, 724.

Appellant having been incarcerated ever since October, 1878, under such unprecedented circumstances of oppression, it is believed this court will not hesitate to discharge him.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. It is alleged in the application for the writ of *habeas corpus* that petitioner is illegally restrained in his liberty, under four several charges of the supposed crime of forgery, and as the process by virtue of which he is held, he sets out as exhibits four indictments and the four *capiases* executed upon him.

Though not directly alleged, it is very apparent from the whole proceedings had in the court below, and from appellant's brief, that the main object sought was the discharge of the applicant upon the ground that the indictments were insufficient and invalid, and did not charge any offence against the law. In other words, the position assumed is that, the indictments being invalid, their invalidity can be inquired of; and, if so found, the party indicted can be discharged without bail, by means of the writ of *habeas corpus*.

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Our statute expressly provides, in *habeas corpus* proceedings, "that no defendant shall be discharged after indictment, without bail." Pasc. Dig., art. 2627.

In *Ex parte Parks*, 93 U. S. 18, it is said: "It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offence charged in the indictment."

In the *Matter of Harris*, 47 Mo. 164, it was held that "where one who has been arrested and detained on legal process, by a court having jurisdiction of the person and the offence, is in custody of the proper officer, and by virtue of a provision of the law, this court will not, on a writ of *habeas corpus*, inquire into the constitutionality of the law under which he was arrested. He should test the validity of that question by means of trial in the appropriate court." It was said in that case: "Admit this proceeding, and then every person charged with committing an offence, of every kind and description whatsoever, instead of standing his trial and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he was arraigned. Such a precedent cannot be established." 47 Mo. 165. See also *Ex parte Granice*, 51 Cal. 375.

In *Ex parte Whitaker*, the Supreme Court of Alabama held that "a party in custody under a defective indictment will not be discharged on *habeas corpus*, in vacation, because of the insufficiency of the indictment." 43 Ala. 323; *Omalia v. Wentworth*, 65 Me. 129.

In the *Matter of Prime*, 1 Barb. 340, the court held that "the writ of *habeas corpus* is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law."

In *The People v. Martin*, 1 Park. Cr. 187, it was held

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that in criminal cases, where an indictment was found, the court or officer granting the writ of *habeas corpus* cannot go behind the indictment, because there is no means of ascertaining upon what the indictment was founded. See also *Matter of Underwood*, 30 Mich. 502.

Before indictment found, the rule seems to be different. In such cases the constitutionality of the law under which the party is held may be the subject of judicial investigation and determination, by means of the writ of *habeas corpus*. Without wishing to be understood as indorsing or concurring in the opinion of the court in the case of *Ex parte Rodriguez*, 39 Texas, 705, we cite that case as one in which the authorities upon this latter proposition may be found collated.

We are of opinion that neither the sufficiency or validity of an indictment, nor the constitutionality of a law upon which an indictment is based, are questions which can be appropriately presented by and through the writ of *habeas corpus*. And, as we have seen, our statute expressly inhibits the discharge of a defendant without bail, after indictment. Pasc. Dig., art. 2627; *Hernandez v. The State*, 4 Texas Ct. App. 425.

This disposes of the questions shown by the record. The application is not framed under the statute, so as to submit for determination the question as to whether or not the bail is excessive. Pasc. Dig., art. 2608.

The judgment of the lower court remanding the applicant into custody, in default of his giving bail in the sums fixed by the court, is affirmed, and it is further ordered that the appellant pay all costs of this proceeding.

Ordered accordingly.

Statement of the case.

TORIVIO GONZALES v. THE STATE.

1. **INDICTMENT — ELECTION.** — When an indictment for murder charges in a single count that the mortal injuries were inflicted by different instruments or means, — as, by shooting, striking, and burning, — the prosecution cannot be forced to elect upon which of them a conviction will be sought.
2. **SAME.** — When several counts in the same indictment are substantially for the same offence, and are introduced for the purpose of meeting the evidence as it may transpire, the State will not be required to elect on which it will rely.
3. **CHARGE OF THE COURT — REASONABLE DOUBT.** — On the trial of an indictment for murder, which charged that the homicide was committed by shooting, striking, and burning, the court below instructed for acquittal in case the jury had a reasonable doubt whether or not the deceased came to his death by the hands of the defendant, from wounds inflicted by some of the means charged in the indictment. *Held*, correct, inasmuch as the jury were not bound to impute the death to any one of the alleged injuries, but could convict if satisfied by the evidence beyond a reasonable doubt that it was the result of all of them combined.

APPEAL from the District Court of Karnes. Tried below before the Hon. H. C. PLEASANTS.

The prosecution was for the murder of Felipe Melendes, in Karnes County, on December 10, 1876, and the conviction was for murder in the second degree, with fifteen years in the penitentiary assessed as punishment. The testimony, of which a synopsis is appended, discloses a case of unusual atrocity.

Frank Smith, colored, for the State, testified that on Sunday, the day upon which the injuries were inflicted, a little after noon, he started from the town of Helena to go to Mrs. Jacobs's place, on the Menehuila, and when he reached the summit of a hill, about fifteen and a-half miles distant, he saw two Mexicans about thirty steps ahead of him, on the side of the hill and a few feet to the right of the road. One was leaning against a horse, on the opposite side from witness, and the other was sitting on his horse, beyond the first one, waving a pistol over his head and talk-

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ing in a loud voice, the only word which the witness caught being "cabron," which witness did not understand. Witness recognizes the appellant as the man who waved the pistol. Witness passed about one hundred and twenty-five yards beyond, and turned to look back, and just as he turned he saw the smoke from and heard the report of the pistol, and saw the man who was standing against the horse fall to the ground. He got up presently, when the appellant rode up to him and struck him over the head with the pistol, felling him again. Appellant then cantered away. Witness then went to a house about a half-mile distant and gave information of what he had seen, and in about one-half or three-quarters of an hour, with two other men, returned to the scene of these occurrences. Witness and party found the deceased about ten or fifteen feet from where he fell, lying on his all-fours, face downward, and in a wagon-rut. His clothes were all burned off from the waist up, except his wrist-bands and collar. Deceased was still alive. None of this party dismounted, or touched deceased, but started off immediately to get help. Witness went on to the place of his destination, some two miles distant, and did not return. Witness thinks the place of these occurrences lies in Karnes County. .

T. C. Tumlinson, the second witness for the State, testified that the deceased was in his employ before his death, and died at his house, in Karnes County, on Sunday (about), November 19, 1876, seven days after he was wounded. On the Thursday before the injuries, deceased asked witness for money, stating that he was going to Cuero, to return on Saturday evening, and accordingly left witness's house. He did not return on Saturday evening, as per promise; and as he was a very prompt Mexican, witness expected him, of course, on Sunday. Late on Sunday evening a man came and told witness there was a Mexican out on the road, dying, who, he thought, was deceased. Witness took a

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wagon and went to the place indicated, and found deceased lying on his face, or side, on the side of the road leading from Helena to Victoria. When witness got there deceased said, "Mr. Tumlinson, I am dying." Witness answered, "No, you may get well." The clothing was all burned off deceased from the waist up, except the wrist-bands of his shirt, and his body was burned into a crisp. The lower jaw was broken in several pieces, and witness noticed a hole under the jaw which appeared to have been made by a knife, a stick, or a bullet, — looked more like the work of a ball. Witness noticed no bruise on the head.

When witness arrived at the place where deceased was lying, it was some time in the night, and there were other parties with him, who had lighted a small fire. Witness attempted to light a small lamp he had with him, and struck four or five matches in the effort, but, on account of a strong wind blowing, could not do it. Witness then had deceased placed in the wagon and taken to his house, where he remained until he died,—seven days afterwards. At witness's request, another Mexican, named Gregorio, waited on deceased until the death of the latter. Witness made no delay in sending for a doctor, who, however, did not reach the wounded man until about daylight. The doctor did not set the jaw, as he said it was useless. When witness started in his wagon for deceased, he sent a messenger for Mr. John Ratliff, a neighbor, who speaks the Spanish language fluently, as he could not himself speak that language and the deceased could speak but little English. Saw the deceased frequently from that night until he died. Deceased often drank liquor, but witness had never seen him drunk. When deceased left the house of witness, going to Cuero, he wore, as was his custom, two shirts and a coat. He then had a pistol also. He did not have the pistol when witness reached him after he was wounded, though some one gave witness his belt and scabbard. Witness does not

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think the pistol-wound in the jaw would have been fatal. Thinks he died from the effects of the burn.

John Ratliff was the next witness for the State. He testified that, on a Sunday night in 1876, T. C. Tumlinson sent for him to come and see deceased, whom he knew well, as he had once been in witness's employ. Saw him first in the wagon, as he was being taken to Tumlinson's house. His jaw was broken in three or four places. Witness could place his finger in deceased's mouth and poke it out at the hole running through under the chin. He had also a bad bruise on the head, just above the ear, which was some three inches long, and appeared to have been made by some heavy instrument. He was also burned into a crisp from his waist up to his neck, except two small places on his breast. Witness does not think the wounds by ball or blow would have produced death, but thinks deceased died from the burn. Deceased talked badly because of his broken jaw, which, however, witness set in two or three days, after a fashion, and in the best way he could; after which deceased talked better. Deceased talked a great deal to witness, and was perfectly conscious of approaching death. He told witness what disposition to make of his little property. Also told witness, of his own notion, voluntarily, and without questioning, who wounded him and how it came about. Deceased's narrative was substantially as follows:

Deceased "went to Cuero to attend to some business, and on his return met appellant in Yorktown, where they took several drinks together, and started to come by Gregorio's house. When the two got to the road leading from Helena to Victoria, deceased's horse fell with him, throwing his pistol from the scabbard to the ground. In the fall deceased's horse got loose. As deceased was catching him, appellant dismounted and picked up the pistol, remounted, and instantly commenced cursing and abusing deceased:

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Deceased did not mount his horse, and presently appellant shot him in the mouth, felling him. As he got up, appellant, who had gone off a short distance, returned and struck deceased on the head with the pistol, felling him again. It seemed to deceased that appellant, after this, was gone a long time. When deceased again saw appellant he came and squatted by deceased, and, striking some matches, put fire to his (deceased's) shirt-bosom. Deceased was lying on his back, and could not move."

Witness knew that the Torivio Gonzales of whom deceased spoke was the appellant. Witness had the appellant in his employ at the same time he employed deceased. The two men, deceased and appellant, had once had some difficulty about some sheep, which witness did not then consider of a serious nature. Witness does not think that the deceased and appellant had met since the difficulty, until they met in Yorktown on this trip of the deceased's.

On the second or third day after the deceased was wounded, witness went to the place of the difficulty and examined it. Found the rut where deceased was found, and knew it by the ashes and blood. By the blood he traced some fifteen feet, to where he judged deceased first fell. Some four or five feet from where deceased fell, witness found four or five matches that had been struck. From the place where he appeared to have fallen to the place where he must have laid and burned was eastward, and still east of this place where he appeared to have laid and burned, witness saw where a little fire had been built. Between the place of his falling and the place of burning, witness also found, in addition to the blood, small patches of ashes. Witness also found a small pocket looking-glass and a pocket-knife, which he recognized as those which deceased was in the habit of carrying.

The next witness for the State was Gregorio, a Mexican, who testified that on the evening of the difficulty some men

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came to his house and told him that deceased was in a dying condition, and where he could be found. Witness found deceased lying near the Helena and Victoria Road, on his all-fours. Witness built a small fire near deceased, and sent for Mr. Tumlinson. When witness got to deceased he found his belt, and his scabbard full of cartridges, but the pistol was gone. Gave the belt and scabbard to Mr. Tumlinson. Mr. Tumlinson took deceased to his house in his wagon. Witness waited on deceased until he died, — was with him all the time until his death. Deceased sometimes appeared in his right mind and rational, but at others was out of his right mind and irrational. When he was sane he would be talking about what he wanted done with his property. Just before he died he was out of his mind, and seemed to fancy that he saw women flying through the air. Witness did not hear him say who killed him, or how he was killed.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was convicted of murder in the second degree, and his punishment assessed at fifteen years' confinement in the State penitentiary; and his motion for a new trial having been overruled, he prosecutes this appeal.

The sixth error assigned is, that the court erred in refusing to compel the district attorney to elect as to which count in the indictment he would try the defendant under, — whether under the one charging the murder to have been done by shooting, or the one charging it to have been done by burning.

It is shown by bill of exceptions that the court was moved to compel this election by the prosecuting attorney, when

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the defendant was arraigned and before he entered his plea, and also after the evidence had been closed; which was refused by the court.

The indictment charges, with great, perhaps unnecessary particularity, first, that the accused shot the deceased in the mouth with a pistol, inflicting a mortal wound; secondly, that the accused struck the deceased on the head with a pistol, inflicting upon him a mortal bruise; and, thirdly, it charges that the accused set fire to and burned the clothes of the deceased, and thereby mortally burned him upon the back, breast, and side; and proceeds in this language: "Of which said mortal wounds, inflicted as aforesaid, in and upon the mouth of him, the said Melendes, and of which said mortal bruise, inflicted as aforesaid, in and upon the head of him, said Melendes, as well as of the said burning of the back, breast, and side of the body of him, the said Melendes, he, the said Melendes, then and there instantly died; and so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Torivio Gonzales, him, the said Felipe Melendes, in the manner and by the means aforesaid, wilfully and of his express malice aforethought, did kill and murder; against the peace and dignity of the State."

An inspection of the indictment shows beyond controversy that the pleader did not intend, nor did he in fact, as is unusual, charge that the murder was committed in three several ways, in so many different counts in the indictment, each having its proper separate commencement and conclusion; but that the several injuries were all inflicted by the accused upon the person of the deceased, and that by those several injuries the murder was consummated. This conclusion is inevitable from those portions of the indictment copied above.

The indictment does not aver that death was the result of either the shot, the blow upon the head, or the burning,

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but that by these several means being employed the murderous effect was produced. If there had been more than one proper count in the indictment, and the several counts were "introduced solely for the purpose of meeting the evidence as it might transpire, the charges being substantially for the same offence," the prosecution would not be required to elect. *Dalton v. The State*, 4 Tex. Ct. App. 333, and authorities there cited.

The charge of the court on this branch of the subject is complained of as allowing the jury too much latitude in arriving at a verdict. The fourth paragraph of the charge is as follows: "If the jury have a reasonable doubt whether or not the deceased came to his death by the hands of the defendant, from wounds inflicted by some of the means charged in the indictment, — that is, from the wounds inflicted by a pistol-shot, or by burning, — they must acquit."

Under this charge the jury would have been warranted in finding the defendant guilty upon satisfactory evidence that by the pistol-shot the deceased had been disabled to free himself from his burning clothes, and in consequence of his condition he died, although the jury might not have been satisfied as to whether the shot or the burning was the immediate cause of death, if the proof showed that beyond doubt the death resulted from either, or from the effect of the two combined. We see no error in this charge, when it is considered in the light of the evidence and the averments of the indictment, and in connection with the charge of the court, taken as a whole. On the contrary, we are of opinion that the charge of the court fairly submitted to the jury the question of the guilt or innocence of the accused, and in a manner not likely to mislead.

The first charge asked by the accused and refused by the court relates to the subject of murder in the first degree, and need not be noticed here; for, even if we should deem

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the instruction proper to have been given at the trial, which is not perceived, it would not warrant the reversal of the judgment of conviction for murder in the second degree, the charge being in other respects unobjectionable.

It is urged in a motion in arrest of judgment that the indictment is insufficient in that it "presents no offence against the law," and because "the offence is not charged in plain and intelligible words." Counsel for the appellant fail, in the record or in arguments, to point out any defect in the indictment, and none are perceived.

It is urged in the fifth assignment of error that the verdict is contrary to law and the evidence. We have failed to discover that this assignment of error is sustained by the record. So far as the law of the case is concerned, the conviction is a proper one. As to the evidence, the only wonder is that the jury did not convict of murder in the first degree. The testimony not only shows the guilt of the accused, but shows also that a most unprovoked attack was made by the accused, when he must have known the deceased was unarmed and entirely helpless, and under these circumstances shot him down, and when he attempted to rise, struck him down by a blow upon the head, and, after going away from the bloody scene, returned, and, finding his victim prostrate and helpless, lit matches and fired his clothes, so that they were almost entirely consumed from the waist up, and his body burned until some of the witnesses thought that the burning was the cause of his death. The evidences of cruelty and fiendish barbarity are clear and unmistakable.

We have failed to discover any material error in the charge given, or in refusing those asked by the accused, or in overruling the motion for a new trial, or in refusing to arrest the judgment, or in refusing to require the counsel for the State to elect as to what particular portion of the

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indictment he would try upon. The appellant has been fairly tried and legally convicted; and, judging by the case as presented, the punishment imposed is well merited.

The judgment of the District Court is affirmed.

Affirmed.

SAM EDWARDS v. THE STATE.

ASSAULT WITH INTENT TO MURDER. — See the opinion for statement of a case, under a prosecution for assault with intent to murder, in which the law of self-defence should have been given in charge by the court, in addition to the law on assault with intent to murder.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. NOONAN.

The opinion discloses the case.

Ogden & Ogden, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. The appeal in this case is from a judgment of conviction for an assault with intent to murder one Albert Johnson.

Jack Merritt, the only witness who was present at the time, and saw the shooting, said: "Defendant and myself were mounted and riding side by side together, — defendant on the side towards the barn. As we got to the barn, where Johnson was standing, I was looking at the time from the direction of the barn, when I heard defendant cry out, 'Shoot, or put down your gun.' I then looked round and saw Al Johnson with his gun raised up to his face and pointing at defendant, and when I looked around Al Johnson was pointing his gun at both of us. Defendant then jumped

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from his horse and grabbed my six-shooter from my side, and commenced firing. He fired four shots in rapid succession at Al Johnson. Al Johnson snapped his gun twice at defendant. * * * I can't tell if Johnson snapped his gun before I looked around. I only know he had it up to his face, pointing at defendant, when I looked around and did see him snap. I cannot tell whether it was before or after defendant fired, as the snapping and firing were so near together."

This witness had previously stated that the defendant was unarmed until he jumped down and grabbed his (witness's) pistol.

In the charge to the jury, the court simply submitted the law applicable to an assault with intent to murder. Under the facts as above detailed, the court should also have charged the law of self-defence.

In *Williams v. The State*, 2 Texas Ct. App. 271, this court held that, "under our Code, when an unlawful attack is made upon a defendant, and the attack is of such a nature that the defendant has reasonable grounds to believe that he is in immediate and impending danger of being murdered or maimed by his assailant, he is justifiable in killing his assailant when, at the time of the killing, some act has been done by the deceased showing evidently an intention to commit such offence; and the defendant in such case may act promptly, without resorting to other means before killing his assailant, because in such case the law presumes the party's safety depends upon his prompt action in killing his assailant." Pasc. Dig., art. 2226; *Lister v. The State*, 3 Texas Ct. App. 17; *Wasson v. The State*, 3 Texas Ct. App. 474. The law of self-defence, as here stated in cases of homicide, is the same in assaults with intent to murder; for, if it would not have been murder if death had resulted, it could not be assault with intent to murder, under the same circumstances, where a homicide was not committed.

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For error of the court in failing to charge the law applicable to the facts of the case, the judgment must be reversed and the cause remanded.

Reversed and remanded.

JIM TRIPPETT v. THE STATE.

PRACTICE IN THE COUNTY COURT. — In the trial of a misdemeanor case, the judge of the County Court is not required to charge the jury except upon the request of either party, and even then he can give a verbal charge only by the consent of the parties.

APPEAL from the County Court of Waller. Tried below before the Hon. W. S. WRIGHT, County Judge.

The appellant was found guilty of an aggravated assault and battery, and his punishment assessed at a fine of \$100 and six months' confinement in the penitentiary.

A. J. Harvey and H. M. Brocone, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. There is only one question which we deem it necessary to notice in this opinion, and that is presented in a bill of exceptions and in defendant's motion for new trial. The court delivered to the jury a verbal charge, without the consent of the defendant, to which he excepted at the time. This was error, for which the judgment must be reversed and the cause remanded.

Reversed and remanded.

Syllabus.

FRANK WEBB v. THE STATE.

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1. **INSANITY—PRESUMPTION OF LAW.**—While one of the ingredients of murder is that the act is that of a person with a sound memory and discretion, it is, upon the other hand, equally well settled, both in law and reason, that every man is presumed to be of sane mind, until the contrary is shown.
2. **SAME—EVIDENCE.**—In order to absolve a defendant in a criminal case from guilt, a higher degree of insanity must be shown than would be sufficient to discharge him from the obligations of his contract.
3. **CHARGE OF THE COURT.**—In all such cases it is the duty of the court to instruct the jury that every man is presumed to be sane, and possessed of sufficient reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that, to establish the defence of insanity, it must be clearly proved that, at the time of the offence, the accused was laboring under such a defect of reason as not to know the nature or quality of the act he was doing, or that, if he did know, he did not know he was doing wrong. The latter part of this question, when put in the abstract, as whether the accused knew the difference between right and wrong, is not so accurate as when put with reference to his knowledge of right and wrong in respect to the very act with which he is charged.
4. **SAME.**—And since it is settled that men may be responsible for some things and not others, the inquiry into the sanity of the accused must be directed to the particular thing done, and not to any other, and has reference to the time of the transaction, and not to any other time.
5. **SAME—EVIDENCE.**—But with regard to the question of proof, in order to ascertain the state of the mind at a particular period, it is competent to inquire into its conditions both before and after in relation to a particular subject, and its condition as to other subjects.
6. **EVIDENCE.**—Evidence of the state of mind of the accused, both before and after the act done, is admissible in determining the question of insanity.
7. **SAME—PRESUMPTION.**—If derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. But this presumption is rather matter of fact than law, or, at most, partly of law and partly of fact.
8. **SAME—NON-PROFESSIONAL TESTIMONY.**—Non-professional witnesses are competent to state their opinions as to the sanity of the party, derived from their acquaintance with and observation of his conduct, appearance, and actions. On this point the case of *Gehrke v. The State*, 13 Texas, 568, is overruled.
9. **SAME—CUMULATIVE.**—In view of this last ruling, as there are no definite limits within which evidence of this kind can be restricted, and because a

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jury would be warranted in giving more credit to the opinion of the many than the few, such evidence cannot be regarded as cumulative.

10. **CONTINUANCE — CASE STATED.** — An application for a continuance, based upon the absence of six witnesses, setting out their opinions of the sanity or insanity of the appellant, derived from their association with him, and their observation of his actions, language, and appearance, and complying with every requirement of the statute, was refused by the court below, and no reason is assigned therefor; leaving this court to infer that it deemed such evidence either immaterial or inadmissible. *Held*, error, as the evidence was highly proper, and the application in every way sufficient.
11. **JURY AND OFFICERS OF THE COURT.** — See the opinion for an admonition to the officers of the court and the jury, touching their behavior pending the trial of a felony case.

APPEAL from the District Court of Brazoria. Tried below before the Hon. W. H. BURKHART.

The indictment charged the murder of Charles R. Foster, in Galveston County, on September 2, 1876. The trial was had in Brazoria County, on a change of venue, and the appellant was convicted of murder in the second degree, his punishment being assessed at forty years' confinement in the penitentiary. The appellant interposed, to no purpose, the defence of insanity. He was defended in the court below by E. J. Wilson and J. T. Mitchell, Esqs.

Robert Vanderpool, the first witness for the prosecution, testified that he is now, and was on September 2, 1876, a resident of Galveston, Texas. Knew both appellant and deceased prior to the killing, and has known the appellant since. On the day last named, in Galveston County, Texas, he saw the appellant kill the deceased. On that day, between nine and ten o'clock, A. M., witness saw appellant sitting on the railroad track, near the stock-pens of deceased. He had his coat off, and thrown across his left arm. The office and stock-pen of deceased were not more than forty or fifty feet from where appellant was sitting. About this time witness saw deceased come out of the office and walk down to the gate. Appellant said to deceased,

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"I want to see you." Deceased responded, "I'll see you when I get through with Paul." Appellant then said, "I've waited long enough; you've done me dirt," and fired at deceased three times. At the first shot deceased said, "Don't kill me, Frank." After the killing, appellant said, in reply to the book-keeper Norman's question what he had "done," "I gave him fourteen days to settle, and he didn't do it, and I killed him." Appellant appeared to witness to be all right. He fired on deceased three shots from a six-shooter pistol, which he pulled from under the coat he held on his arm, and after he fired he put the pistol back in the side-pocket of the coat, as it lay on his arm, and walked off. The pistol was a large-sized Colt's cartridge six-shooter. Witness saw appellant on the Thursday before the Saturday of the killing, at the Olive Branch Hotel, in Galveston City, and saw him in the city of Galveston some days before Thursday, and at no time noticed anything unusual or strange in his looks or conduct.

On cross-examination, the witness says that he was on the inside of the pen, through which he could see plainly, as it was an open, pine-plank fence. Jim Giddings was at the gate, holding it open. Appellant and deceased were outside. Giddings, Paul Bayse, and witness were about the same distance from the parties. Mr. Norman and Mr. Davis were in the office until the firing commenced, when they came out. Deceased came out of the office to sell some cattle to Mr. Bayse. Witness was in the employ of the butchers, driving cattle from the pen. After the killing, appellant very deliberately walked off in the direction of the city.

The State next introduced James Giddings, who testified that about one-half hour before the shooting, and while he was lying under a car on the side track south of the pen, appellant came down the track and sat down on it, holding his coat over his left arm. Presently Mr. Paul Bayse came

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to the pens to buy some stock, and witness called deceased, who was then in the office, to come down. As deceased came, appellant said to him, "I want to see you;" to which deceased replied, "I will see you as soon as I wait on Paul." Appellant then said, "I have waited long enough," and immediately pulled his pistol and commenced his fire. After the first fire, deceased staggered up against the fence, and said, "Frank, there is no use in that."

On cross-examination, the witness states that when the killing took place he was at the gate, and Vanderpool and Bayse near by.

The next witness introduced by the State was Paul Bayse, who, being a Frenchman, and unable to speak the English language, testified through a sworn interpreter. He testified that, on September 2, 1876, he was at the stock-pens of deceased, in Galveston County, when the killing occurred. Knew the parties; and when the killing took place was about fifteen or twenty feet distant. Jim Giddings was about thirty feet off, and standing in the gate, Vanderpool about equidistant. When witness was coming to the pens he saw Giddings lying under a car on a side track, on the gulf side of the pen. Appellant was near by, sitting on the track, with his coat off. Witness counted only two shots fired by appellant.

Cross-examined: Witness says that he heard deceased say nothing. Heard appellant say something which he did not understand, as he speaks only enough English to buy cattle.

Joe Davis, witness for the State, testified that when deceased was killed, he and Norman, the book-keeper, were in the office together, and ran out on hearing the report of fire-arms. Witness stopped at the foot of the steps, but Norman ran on to where the body lay, meeting appellant walking from that direction. As the two passed, witness heard Norman ask, "Frank, what have you done?" To

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which appellant replied, "I told him I would give him a chance." Appellant continued walking on towards town, and witness saw him an hour afterwards, under arrest. Had known appellant four or five years, and had been for five months boarding at the same house with him, and had never seen anything in his manner or conversation indicating insanity.

On cross-examination, witness testifies that he is neither an expert nor a physician. When appellant was brought back to the place of the killing, in the presence of the body during the whole time of the coroner's inquest, he displayed no emotion, but observed a seeming indifference.

A. P. Norman was the next introduced by the prosecution. He testifies that he was in the office of deceased when he was killed. Before the killing he saw appellant sitting on the railroad, as described by other witnesses. When he heard the shots he ran out, and saw appellant standing over the body of deceased, and as witness started towards them appellant walked off in the direction from which witness was coming. As witness ran by he asked, "Frank, what have you done?" to which witness heard no reply. On the Saturday week before the killing, witness met appellant in Galveston, and had a long talk with him about his business difficulty with deceased. Appellant gave witness correctly the dates of the transactions. Witness was the friend of both parties, and the book-keeper of deceased.

The misunderstanding spoken of grew out of some cattle business, the appellant having left some with deceased for sale. On the Tuesday before the killing, witness again met appellant in the Olive Branch Hotel, in Galveston, and there expressed the wish that the matter might be settled without a personal difficulty; to which the appellant assented, and requested witness to see deceased about it, and to that end.

On cross-examination, witness said that appellant told him that deceased had garnished his money, and that the

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garnishment had to be withdrawn. Between this time and the killing, appellant did not call on witness to know if a settlement had been made. In his conversation, appellant was very bitter against the deceased, though he made no threats. In none of his communications with appellant had witness observed anything strange or unusual about his appearance. Appellant, for some time previous to the killing, though not at the time, had been in the employ of J. C. Borden, as salesman of stock, a position which required a shrewd business man. At the time of the killing, appellant was doing business on his own account, driving stock to the Galveston and Houston markets. Witness reported to deceased the conversation with appellant in regard to a settlement.

William Lott, for the State, testified that he was, at the time of the killing, a clerk in the ammunition store of Labadie. On the morning of the shooting, between seven and eight o'clock, appellant brought a Colt's cartridge six-shooter, of forty-five calibre, into the store, and had witness to load it all round, for which he paid the price, twenty-five cents. Appellant then put the pistol in the breast-pocket of his coat, and, throwing his coat over his arm, walked off. It is about one and a-half miles from Labadie's store to the stock-pen where the shooting was done. Witness noticed nothing unusual in the manner of appellant. Here the State rested.

The defendant introduced Amos Haynes, his cousin, who testified that he had known appellant from his childhood. The grandfather and granduncle of appellant had both been insane, and both committed suicide. The mother and a cousin of appellant were insane, and the father of appellant was a very strange and a very eccentric man. Witness never heard of other insanity in the family, and knows this as family tradition.

J. D. Webb, for the appellant, testified that he is the

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brother of appellant. The grandfather and granduncle on their father's side had both been insane, and both committed suicide. Their mother was now, and had been insane for fifteen years. Their father was a very strange and eccentric man. Before he died he had a suit of clothes made. He had the coat, or robe, made to reach his heels, bound with wide red tape, and his pants with wide red stripes, and desired to be buried in the suit, with his boots on, using a plain box for a coffin. Don't know that he was insane.

When the appellant came home, about a month before the killing, his demeanor, appearance, and conduct were so changed that it caused apprehension that his mind had gone wrong. His habits of life had previously been jovial and sociable, but he now had become reticent, and would go to the woods alone, and remain so for hours. Would talk to no one, nor speak of his business matters. On this trip he remained at home but a short time before he went back to Houston, where he had some cattle. The day before the killing, witness went to Galveston to sell some cattle, getting there at night. Found appellant in bed, asleep, and it was with difficulty that he could rouse him, and it was a minute before he could be got to recognize witness and a friend who was with him. He looked strange and wild, and very much altered since witness had seen him the last time spoken of above. Appellant went down into town with witness and friend that night, and separated from them about one o'clock. Did not tell witness there was any business difficulty between him and deceased. Witness knew of no difference between the two before the killing, and thought they were friends. Witness left early next morning, and was shipping cattle during the day at Johnson Foster's pens, where he heard of the killing.

Henry Evans, for the defence, testified that in 1862, when appellant was a boy about fourteen years of age, he (witness) travelled with appellant and his father from Jackson

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County, some 150 miles, to the city of Austin. On the road the father told witness that appellant was subject to spells of strange ways, and that, as his mother could not manage him, he was afraid to leave him at home. When his father left camp he always asked witness to watch appellant. Witness observed no marked evidences of insanity in appellant during this trip; he was wild and frolicsome, like other boys. Col. Webb, the father of appellant, was then enrolling officer, and had five conscripts and guard in charge.

Frank Taylor, for the defence, testified that he was, on September 2, 1876, bar-keeper at the Fitzpatrick Hotel, where appellant always boarded when in Galveston. He had been boarding there a long time. He had been absent some little time before the killing, and came back three or four days before the killing, looking very much changed. His eyes were wild and bloodshot, and his face swollen, though he had not been drinking to excess. Was drinking then less than witness had ever known him to drink. He would sometimes sleep very profoundly, and the two nights before the killing, witness heard him walking all through the night; and when asked what was the matter, he would say nothing, and talked but very little. During the day he would go into the sitting-room, sit down, pull his mustache, and talk to himself. His conduct was so strange that both witness and Fitzpatrick remarked it, and declared that something was the matter with him.

On the day before the killing, deceased rode up before the bar-room and asked witness if appellant was in; and witness called appellant, who went out. The two shook hands friendly, and had a long talk, and when deceased rode off they shook hands again, and witness heard deceased ask appellant to come to see him. Appellant then came in, and slapped witness on the shoulder and said, "Let us take a drink, I have settled my business with

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Charles Foster," and seemed to be very happy over it. After awhile he came back and asked me to take another drink, and those two drinks were the only ones I saw him take after he had got back to the city.

After the second drink, appellant went back to the same place in the sitting-room where he had passed the two previous days in such a strange manner, and seemed to relapse into the same moody way, having nothing to say to any one. That night he slept but little, but walked; and next morning he asked witness for his coat, which was behind the counter. He then went out, and returned sometime later and asked for his pistol, which witness had taken out of the coat pocket and put under the counter. Witness told him he would be arrested for carrying concealed weapons, and asked him what he was going to do with it. He responded that he was a policeman, and was going on duty, and that he had lost his badge. He was looking very wild and strange, and not drinking at all. He went out in a great hurry, and witness saw no more of him until he came back in the custody of James Cahill, and took a drink; when Cahill told witness what had happened, appellant appeared careless and indifferent, and looked just as he did before he left. Witness has never testified before, though he has been here three times. This is the first time this case was ever called for trial during the attendance of witness. Was not here at the mistrial. Was attached three days ago by the sheriff, and brought here. Does not recollect the date of the killing. It was in September, 1876. Does not recollect that the appellant was in Galveston in August, 1876. Doesn't know the date of the killing,—it may have been on the 26th. Witness's employment with Fitzpatrick ceased on September 1st, but witness did not go out of the house. Went back into his employment on the 2d.

A hypothetical case was then put to Dr. O. H. Seeds,

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from the standpoint of the defence, and the doctor testified that it indicated the acts of an insane man.

Upon cross-examination, the State stated a hypothetical case from its standpoint, and the doctor testified that upon such a view they were the acts of a sane man.

Dr. Turner's testimony was substantially the same.

Dr. Cochran, upon a hypothetical case stated by the prosecution, stated that the acts would be those of a sane man, and as presented by the defence, said they indicated insanity; but he could not understand appellant's walking a mile or so, although it might be explained or called "method in madness."

No brief for the appellant has reached the reporters.

Thomas Ball, Assistant Attorney-General, for the State. In this cause two questions present themselves.

1. Was it error to overrule appellant's motion for a continuance? It is thought not. The grounds set out in the application for the various witnesses' evidence were to prove appellant's curious, weird, wild, and vacant looks, in order to show insanity, etc. In order to get a continuance on this ground, the court must be satisfied of "*the materiality of the evidence.*" The court below, in the exercise of judicial discretion, held the contemplated evidence worthless, and refused the continuance. The statement of facts shows, beyond question, that there were many witnesses before the court on the final trial of appellant, put there by him to testify as to his mental condition on and about the time of the murder. So it will appear that no wrong was done him for the want of other witnesses on the question of pretended insanity, and he should not be heard to complain. See Pasc. Dig., art. 2987, subdiv. 3; *McCarty v. The State*, 4 Texas Ct. App. 462.

2. In the motion for new trial, the main question raised

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is that the jury acted improperly during the trial (not after the cause was submitted to the jury). During the trial the jury did not act so as to make an exception to the ordinary rule, and bring their action in this trial within the exception laid down in *Early v. The State*, 1 Texas Ct. App. 274, but will be controlled by the general rule as given in *Davis v. The State*, 3 Texas Ct. App. 93; *The State v. Forney*, 24 La. An. 191; *The People v. Montgomery*, 13 Abb. Pr. (N. S.) 207; *The State v. Morphy*, 33 Iowa, 270; *Ellis v. Ponton*, 32 Texas, 435.

As to the wild, weird looks of appellant, indicating insanity, as set out in the last motion, it is submitted that if every word relating to the insane condition of defendant, as stated in the motions for continuance and new trial, were true and had been proven on the trial, there would have been no difference in the verdict, because none of the statements indicate insanity, but only extraordinary actions, as forerunners of his contemplated deed. *Halbert v. The State*, 31 Texas, 357.

The transcript herein presents the only case of record (if appellant was in fact insane) where an insane person admits it. All the records of all the asylums in the world fail to show where an insane inmate has admitted his insanity. The reverse, though, is true with lunatics, — all are crazy except the lunatic. And it is submitted to the court that this peculiarity is a matter of history as to lunatics, and that the bare fact of a person asserting and swearing to his own insanity is sufficient ground for any court to overrule such sworn statement for a continuance, because such assertion at once judicially informs the court that the affiant is sane. But in this cause appellant had a fair hearing on insanity. All was submitted to the jury by the charge of the court, after much evidence was heard as to the pretended mental aberration; so, it seems, no wrong could have resulted from being forced into the trial.

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It is presumed that the motion to quash was waived and not acted on, as the record is silent. There does not appear any error in the charge of the court.

WHITE, J. It is a wise as well as most humane provision of our law that "no act done in a state of insanity can be punished as an offence." Pasc. Dig., art. 1643. With regard to murder, it is specially declared a part of the definition of the crime that it is the act of "a person with a sound memory and discretion."

On the other hand, it is equally as well settled, both in law and in reason, that every man is presumed to be of sane mind until the contrary is shown. 1 Greenl. on Ev., sec. 42. "In criminal cases, in order to absolve the party from guilt, a higher degree of insanity must be shown than would be sufficient to discharge him from the obligations of his contracts." Id., sec. 372. "In all such cases the jury are to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not deemed so accurate when put generally and in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged." 2 Greenl.

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on Ev., sec. 373; *Carter v. The State*, 12 Texas, 500; 1 Whart. Cr. Law, 6th ed., secs. 15, 16.

Mr. Bishop says: "The inquiry is directed to the particular thing done, and not to any other; because, as we have seen, a man may be responsible for some things while not for others. Of course, also, it has reference to the time of the transaction, not to any other time. The reader, however, should distinguish these questions from questions concerning the proof; for, to ascertain the state of the mind at a particular period, we may inquire into its condition both before and after in relation to a particular subject, its condition as to other subjects." 1 Bishop's Cr. Law, 4th ed., sec. 476.

Evidence of the state of the mind of the party both before and after the act done is admissible in determining the question of sanity. 2 Greenl. on Ev., sec. 371.

Another rule, equally well settled, seems to be that "if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. But, this presumption is rather matter of fact than law, or, at most, partly of law and partly of fact." 1 Greenl. on Ev., sec. 42.

Whatever may have been the rules of evidence heretofore with regard to the character of proof admissible on the subject of insanity, the doctrine that non-professional witnesses should be allowed to state their opinion as to the sanity of the party, derived from their acquaintance with and observation of his conduct, appearance, and actions, has become too well settled to admit of doubt or controversy at this time. *Holcomb v. The State*, 41 Texas, 125; *McClackey v. The State*, decided by this court at the Tyler term, 1878, *ante*, p. 320.

We are aware that in *Gehrke v. The State*, our Supreme

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Court, following in the wake of the decisions in Massachusetts and New Hampshire, held otherwise. 13 Texas, 568. The subject has, however, of late years been more thoroughly examined and discussed; and in New Hampshire particularly, in the recent case of *Hardy v. Merrill*, Foster, C. J., of the Circuit Court, in a most elaborate opinion, concurred in by the Supreme Court, reviews the previous decisions and overrules them, which places that court in full accord with the English and American doctrine as it now generally obtains on that subject. 56 N. H. 227. The case of *Gehrke v. The State*, 13 Texas, 568, has been practically, as we have seen, and will be hereafter considered as overruled on this point.

Now, from what has been stated above, it necessarily follows that there are no definite limits within which the evidence can be restricted on an inquiry of this sort. Nor is the investigation one in which the judge could well say that additional evidence would be but cumulative of like testimony already adduced; for the greater the number of witnesses who would depose to the opinion that a party was insane, the more likely would the jury, we apprehend, be inclined so to believe and become satisfied of the fact.

In the case at bar, the defence was insanity. An application for continuance was made on account of the absence of six of defendant's witnesses, all of whom had been duly attached, and were under bond to appear and testify. The facts to which they would depose are fully set out in the application, and it contained the opinions of those witnesses as to the insanity of the defendant, gathered from their associations with him, and their observations of his conduct, language, and appearance for some weeks prior and down to and including the very day of the killing, both before and after the act.

This application was, moreover, in strict compliance with

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the requirements of the statute. No reason is given by the court for its action in overruling it, and we are left to infer that it was upon the ground that the evidence was deemed immaterial or inadmissible. We do not think so; on the contrary, it appears to us both material, admissible, and pertinent to the issue to be decided; and its materiality becomes much more apparent when we consider it in connection with the evidence actually adduced for the defendant on the trial. How far these witnesses can be relied upon for the truth, or how far their testimony might have influenced the action of the jury in finding their verdict, it is impossible for us to say. As presented to us, the application for continuance was sufficient, and should have been granted.

In reversing the case, we deem it necessary to refer to certain acts of misconduct (complained of) on the part of the jury and the officers having them in charge, which, to say the least of it, does not comport with our ideas of the serious solemnity of the duty of those having in charge the life of a fellow-being. The jury were allowed to have and drink several bottles of whiskey, some of which were conveyed to them by the officer having them in charge. Had any one of them become intoxicated to such an extent as to render it probable his verdict was influenced thereby, it would have been the duty of the court below to have granted a new trial. Pasc. Dig., art. 3137, subdiv. 7.

Again, one of the jurors was permitted to make, and did make, a horse-trade with another party, who was not upon the jury. It is true, the officer says it was done in his hearing and presence, and no injury, perhaps, was done the defendant under the circumstances. Still, such things are calculated to throw suspicion upon a verdict; and a verdict in a case involving the momentous issues of life and death should be above suspicion, and command entire confidence. *Early v. The State*, 1 Texas Ct. App. 248.

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Because the court below erred in overruling defendant's application for a continuance in the first instance, and afterwards erred in refusing a new trial, the judgment is reversed and the cause remanded.

Reversed and remanded.

WILLIAM PECK v. THE STATE.

1. CONTINUANCE. — The allegation that the continuance is not sought for delay is indispensable in an application, whether it be for a first or a subsequent continuance.
2. SAME — CASE STATED. — The application for a third continuance shows that the defendant, eight days before being placed upon trial, caused a subpoena for a witness to be issued and placed in the hands of an officer, and had at the previous term of the court caused an attachment for another witness to be issued and placed in the hands of an officer, neither of which processes, by no default of the defendant, had been returned by the officer, etc. *Held*, that, this being the third application, due diligence is not shown.
3. PRACTICE. — The court properly refused an instruction asked by the defendant, when there was no testimony before the jury to which it could apply.
4. HOMICIDE — JUSTIFICATION. — Evidence of a difficulty between the parties several hours before the killing will not, of itself, afford justification for the homicide.
5. SAME — THREATS. — A defendant on trial for murder, seeking to justify himself on the ground of previous threats against his own life, may introduce evidence of threats made; but such shall not be regarded as a justification, unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threats so made.

APPEAL from the Criminal District Court of Harris. Tried below before the Hon. J. MASTERSON, judge of the Twenty-first Judicial District.

The facts are substantially stated in the opinion of the court.

Opinion of the court.

No brief for the appellant has reached the reporters.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant was indicted at the October term, 1877, of the Criminal District Court of Harris County, for the murder of Alfred Burney. The cause was twice continued on the application of appellant, and at the October term, 1878, of said court it was tried. The appellant was convicted of murder in the second degree, and his punishment assessed at thirty years in the penitentiary.

The first question we propose to consider arises upon the action of the court in overruling appellant's application for a continuance. The appellant moved the court to grant him a continuance "on account of the absence of John Fulton, a resident of Harris County, whose testimony is material to his defence, and for whom the defendant, by his attorney, ordered a subpoena to issue on or about October 15, 1878; that said subpoena, on above said day, was issued and placed in the hands of the sheriff of Harris County, but, by no default of the defendant or his counsel, has not been returned; which will appear by the affidavit of one of his attorneys, of record, filed herewith, marked defendant's 'exhibit A,' and prayed to be read as a part of this application; that he can prove by said witness Fulton that, shortly prior to the killing of Burnett by this defendant, he, the said Burnett, went to said witness and told him that he had had an altercation with the defendant, and that, had he not been prevented, he would have killed this defendant, but that he now had his own pistol (showing the witness the pistol), and that he (Burnett) intended to kill the defendant as soon as he saw him. And defendant says, further, that he cannot safely go to trial on account of the absence of Charles Irwin, a material witness to his defence, a resident of Harris County, and for whose appearance the defendant, by his

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counsel, at the last term of said court, ordered an attachment to issue, directed to the sheriff of Harris County, which said attachment was, as this defendant is informed, duly issued and placed in the hands of said sheriff; that said sheriff has made no return thereof to this court; that he expects to prove by said Irwin that in the morning of the day on which the killing of Burnett by this defendant took place, and but a few hours prior to the killing, the said Burnett attempted to shoot the defendant with a gun belonging to said Irwin. Defendant further says that said witnesses are not absent by his procurement or consent, and that he has a reasonable expectation of procuring their attendance at the next term of said court; that the above testimony cannot be procured from any other source."

"Exhibit A," which is referred to in defendant's application for continuance, is the affidavit of his attorney, of record, who states therein that, on or about October 15, 1878, he, as the attorney of the defendant, directed a subpoena to issue to the sheriff of Harris County, commanding him to summon one John Fulton to testify in behalf of said defendant.

The court did not err in overruling appellant's application for continuance. It was fatally defective because it nowhere states that the same is not made for delay, which is required in the first and in every subsequent application for continuance. And, this being the third application, no sufficient diligence, we think, is shown on the part of appellant, nor excuse for not being more diligent.

The defence relied on in this case is that, at the time appellant killed Burney, he (appellant) was acting under a well-grounded belief that his life was in immediate and imminent danger from Burney. Emily Bates, a woman who was living with appellant as his wife, testified that appellant and Burney had had a difficulty at the house of appellant on the morning of the day that deceased was

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shot; that deceased went off and got a gun, which was taken from him; that deceased then came by appellant's house, told appellant that he was going after his pistol, and that he intended to kill appellant before night.

The evidence on the part of the State shows substantially that the appellant, with four other persons, left Bender's mill to go to Spring Station for a lot of corn. They were in a truck, pulled by two mules, on a tramway. About half a mile from Spring Station they met Albert Burney and Henry McFarland, who stepped off the track to let the truck pass, and stood on the side of the road facing the track, making no hostile demonstrations. Burney greeted the men on the truck; he had nothing in his hands, and had his hands hanging down by his side. Just as the truck was passing him, appellant put out his hand and shot the deceased with a pistol, who died from the effects of the shot.

The appellant asked the court to give the following instruction, to wit: "You are charged, gentlemen, that if you believe, from the circumstances surrounding the case, that William Peck, the defendant, acting under a well-grounded apprehension that his life was then and there in imminent danger, when shooting the deceased, or that he was then and there in danger of great bodily injury being done him by deceased, and that he then and there shot deceased to save his own life, you must acquit the defendant. You are to judge said circumstances by all the incidents surrounding, coupled with the actions of the deceased at the time."

The court properly refused to give the charge asked by the appellant, because there was nothing in the evidence to justify it. The statement of facts shows that no act was done by Burney, at the time he was shot, which manifested an intention on his part to take the life of appellant or inflict any serious bodily injury upon him. The previous difficulty

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between these parties, several hours before the shooting, was no excuse or justification for the homicide.

On the subject of threats, the court, in its charge to the jury, instructed them that "threats made against the life of a defendant, when the evidence shows an act by the deceased then done from which the defendant might reasonably infer an immediate intention to carry the threats into execution, would justify homicide in the defence and protection of himself; but mere threats, unaccompanied by any such demonstrations, would not justify homicide."

Our Criminal Code provides that, "where a defendant accused of murder seeks to justify himself on the ground of threats made against his own life, he may be permitted to introduce evidence of threats made; but the same shall not be regarded as affording a justification for the offence, unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threats so made." Pasc. Dig., art. 2270.

The court charged all the law applicable to the case. The evidence is sufficient to sustain the judgment. We find no error in the record that would warrant a reversal of the judgment.

Believing that appellant has had a fair and impartial trial, and been properly convicted, the judgment is affirmed.

Affirmed.

DAN WILLIAMS v. THE STATE.

1. PRACTICE — CHARGE OF THE COURT. — In a prosecution for a misdemeanor, the court below is not required to charge the jury, except by request of either party; and then the charge cannot be given verbally, except by consent of the parties.
2. VERDICT. — It is not necessary that the verdict in a criminal case should be signed by the foreman of the jury.

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APPEAL from the County Court of Waller. Tried below before the Hon. W. S. WRIGHT, County Judge.

The appeal was from a conviction and fine of \$100, for aggravated assault and battery.

A. J. Harvey and Boone & Griffin, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. On the trial below, defendant saved a bill of exceptions to the action of the court in charging the jury verbally. This, under the statute, makes it obligatory upon this court that the judgment should be reversed. Pasc. Dig., art. 3067; *Jordan v. The State*, decided at this present term of court, *ante*, p. 422.

The other error complained of, viz., that the verdict is not signed by the foreman, is not well taken. *Morton v. The State*, 3 Texas Ct. App. 510.

Reversed and remanded.

JOHN FIELDS *v.* THE STATE.

1. CONTINUANCE.—An application for a continuance on account of absent witnesses, even if it shows that the process was sued out in ample time, does not show diligence if it fails to show that it was placed in the hands of an officer in ample time.
2. SAME.—This court repeats its former suggestion (1 Texas Ct. App. 452) that “the better practice, in order to establish such diligence beyond controversy, and certainly the most satisfactory, would be to make the process itself, if returned, a part of the application, as an exhibit.”

APPEAL from the Criminal District Court of Harris. Tried below before the Hon. J. MASTERSON, judge of Twenty-first Judicial District.

Statement of the case.

The appellant was indicted for rape upon the body of Catherine Keyser, committed in Harris County, on April 10, 1878. He was convicted on the 25th day of October of the same year, and adjudged to death by hanging.

Mrs. Catherine Keyser, testifying for the State, said that she is a widow, forty-one years old. On May 17, 1878, her water at home having given out, and wishing to do some washing, she took her six-year-old daughter, and started down the railroad to see if some ponds of water could not be found from which a supply could be obtained. After walking some distance they found some water, and started back home, intending to return for water after dinner. They tarried on the way picking blackberries, and on looking up, saw appellant, some fifty yards off, coming towards her. Witness felt uneasy and started on, but stopping along to pick berries. Appellant caught up with witness and her daughter, and, saying he was hungry, commenced picking berries also. He then said to witness that he was going to make some money, to which witness made no reply. He then asked witness who it was cutting wood down the road, to which witness replied that they were a "couple of colored men." The parties were not near enough to see the men, but could see their axes, and sometimes their heads. Witness passed them going to the pond, and knows they were colored men. Appellant passed on ahead a short distance, and then turned and came back, grabbed witness around the neck, threw her to the ground, pulled up her clothes, and got on her. Witness screamed once, when appellant choked her with both hands, so that she could scream no more. The child, who was some distance behind, then ran up to beg, and screamed, when appellant grappled her throat with one hand, and also threw her to the ground, choking her to keep her from screaming. Appellant was insensible to all appeals, and proceeded to the perpetration of his design, penetrating the person of witness with his male

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member. Witness was helpless from fright; had her jaw dislocated, and her neck badly scratched by appellant. Appellant left witness after accomplishing his purpose, and presently witness's son came up, and witness told him about appellant's choking her. Witness told her neighbors about it. Told Mr. and Mrs. George Schuber, and Mr. Minter. Went to Mr. Minter's house that same evening, and told him about it, and went to the magistrate's office that same week to have appellant looked for. Had never seen appellant before this occurred, to her knowledge. Recognized him now by his every feature, the movements of his head, and cannot be mistaken. The first time witness saw him afterwards, she identified him from among other colored persons, and she was so affected that she had the officer take him from her sight. Witness was completely at the mercy of appellant, who is a grown-up man. All of this happened in Harris County, Texas.

Frank Y. Keyser, for the State, testified that he is fifteen years old, and the son of the last witness. On the day of this outrage he was in the woods, hunting his horse, when he heard his little sister scream, but thought she must only be playing with her little dog, and that the dog probably was jumping up on her. Witness went on, when suddenly he saw appellant coming along, with a club in his hand. Appellant told witness he would kill him if he (witness) bothered him (appellant). Witness then ran out of the woods and found his mother, who told him that a negro man had thrown her down and choked her. Knows appellant is the same man.

Joseph Minter, for the State, testified that he lives about one-half mile from Mrs. Keyser, who told him of the outrage the day that it occurred.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

Opinion of the court.

WHITE, J. John Fields, the appellant in this case, was indicted in the Criminal District Court of Harris County, on June 20, 1878, for rape, alleged to have been committed by him upon "the body of one Catherine Keyser, a female," on April 10, 1878. The trial from which this appeal is prosecuted was had on October 25, 1878, and resulted in his conviction, with his punishment assessed at death by hanging.

Notwithstanding the serious nature of the case for appellant, as here presented, there is no appearance of counsel for him, though he seems to have been well defended in the court below. This fact has only conduced to add to the responsibility which, as a court of last resort, we feel in cases involving the life of a human being. Fully alive to a sense of this responsibility, we have searched the record before us with unusual care, and we find as the result of our investigations that there is really but one question on this appeal, and that is the refusal of the court to grant defendant's application for a continuance.

It will be noted that the indictment was found June 20th, The application for a continuance was made October 25th. The application is in these words: "Now comes the defendant, John Fields, at this term of this court, and moves the court to grant him a continuance until next term, because, he says, he cannot safely go to trial for the want of the testimony of Peter Mosley, who *are residents* of Harris County, whose testimony is material to his defence. That he caused, on the 10th day of October, a subpoena directed to the sheriff of Harris County to issue for him, and which said subpoena was by the sheriff of said county returned on the 25th day of October, 1878, 'not found;' and that thereupon he had an attachment issued, directed to the sheriff of Harris County, for said witness, which was by him returned on the same day by said sheriff 'not executed;' and that he expects to prove by said witness

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that on the 17th day of May, the time said offence is alleged to have been committed by him, that he was in company with said witness all day that day, and that he could not have committed said offence without his seeing him, and that he will swear that he did not commit said act. That said witness is not absent by the procurement or consent of the defendant, and that this application for a continuance is not made for delay." This motion was properly signed and sworn to by defendant.

In certifying the bill of exceptions granted to the overruling of the motion, the district judge adds a memorandum, in these words: "The affidavit does not disclose when the subpoena was placed in the sheriff's hands; for anything appearing, it might have been or was placed in said officer's hands on same day it was by him returned not found, *i. e.*, 25th October. The party having been once before tried, in the opinion of the court no sufficient diligence is shown by the affidavit." We concur in the correctness of this view of the court with regard to the showing of diligence. If the subpoena was placed in the hands of the officer on October 10th, that fact should have been made to appear. In all cases the date of its going into the hands of the officer can or should be shown by the indorsement upon the process itself, where it has been returned. As was said in *Buie v. The State*, 1 Texas Ct. App. 452, "the better practice, in order to establish such diligence beyond controversy, and certainly the most satisfactory, would be to make the process itself, if returned, a part of the application, as an exhibit." See also *Murray v. The State*, 1 Texas Ct. App. 417; *Cantu v. The State*, 1 Texas Ct. App. 402; *Grant v. The State*, 2 Texas Ct. App. 163; *Summerlin v. The State*, 3 Texas Ct. App. 444; *Bowen v. The State*, 3 Texas Ct. App. 617; *Johnson v. The State*, 4 Texas Ct. App. 268.

In the five months which elapsed from the finding of the

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indictment to the date of the trial, and especially where the party had once before been tried during that time, it does appear to us that defendant should have been able to have made a more certain statement of the diligence used by him; to say the least of it, he should have shown that his process went into the hands of the proper officer before the day of trial.

We believe defendant has had a fair and impartial trial, and that he has been legally convicted of one of the most heinous crimes known to our law. That he is guilty as found by the jury, the evidence as before us abundantly shows. If guilty, that his punishment may be affixed at death is, we think, a wise provision of the law in such cases. We see no error, and the judgment is affirmed.

Affirmed.

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80	344

JOHN WINN v. THE STATE.

1. **INDICTMENT.** — PRINTED FORMS for indictments may be used, the blanks being properly filled, without infringing the statutory requirement that an indictment shall be the "*written* statement of a grand jury," etc. And a business card of the printers of such forms, put at the head of the blanks, however conspicuously displayed, or unseemly, is no part of the indictment, nor an infraction of the requirement that indictments must commence, "In and by the authority of the State of Texas."
2. **SAME** — Nor does an unnecessary written caption constitute part of an indictment, or impair its validity.
3. **ASSAULT WITH INTENT TO MURDER.** — In trials for this offence the jury need not be instructed on the law of minor assaults, nor on self-defence, unless the evidence requires such instructions as part of the "law applicable to the case."

APPEAL from the District Court of Bastrop. Tried below before the Hon. L. W. MOORE.

The opinion clearly states all material facts.

Opinion of the court.

Fowler & Maynard, for the appellant. The court should have given to the jury the statutory definition of a simple assault, and simple assault and battery, as a part of the definition of an assault with intent to murder. Pasc. Dig., arts. 2137, 2138, 2155.

We do not insist that the definition of a simple assault should have been given for the reason that there is evidence in the case tending to show that the offence committed was only simple assault, and so as to allow the jury an opportunity to find the defendant guilty of a simple assault only, but because, under our statutes, the definition of a simple assault is necessarily a part of the definition of an assault with intent to murder, and that, therefore, it is impossible to define the assault with intent to murder without embracing in such definition the statutory definition of a simple assault.

An assault with intent to murder is composed of one offence actually committed, viz., a simple assault, coupled with an intent to commit another offence, viz., murder. Now, the court very properly defined the offence intended to be committed, but failed to define the one actually committed; and we submit that there are just as good reasons for defining the offence actually committed, within the meaning of the definition of an assault with intent to murder, as there are for the one only intended.

We further submit that, so far as our observation extends, this case in this respect is an isolated one, and that the learned judge before whom it was tried departed from his usual practice in giving charges in cases of this kind.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. It appears that the indictment in this case was drawn by filling up, in writing, the blanks in a printed

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form. Above the writing was printed the words, "Van Beek, Barnard & Tinsley, printers, stationers, lithographers, and blank-book makers, St. Louis; Class 2." Then followed, in writing, the caption, in these words, viz.: "The State of Texas, } In the District Court of said coun-
"County of Bastrop. } ty, Spring Term, A. D. 1878."

Motion to quash was made because the indictment did not commence, "In the name and by the authority of the State of Texas;" as is required by the statute (Pasc. Dig., art. 2863), and also by section 12, article 5, of the Constitution, which provides that "all prosecutions shall be carried on in the name and by the authority of the State of Texas, and conclude, 'against the peace and dignity of the State.' " This motion was overruled by the court, and, as we think, properly.

Though the statute defines an indictment to be "the *written* statement of a grand jury, accusing a person therein named of some act or omission which by law is declared to be an offence" (Pasc. Dig., art. 2862), it has never been held that a printed form, with its blanks properly filled in writing, was not a sufficient compliance with the law. We do think, however, that as a matter of taste and propriety, in having forms printed for his sole convenience, the prosecuting officer might stipulate with his printers that the blanks to be printed should not be used by them as an advertising medium; or, if so, that their names should not be placed in so conspicuous a portion of the form, and in such connection with it as that their advertisement will be mistaken, as seems to have been done by defendant and his counsel in this case, for part and parcel of an indictment charging him with an assault with intent to murder. The process and pleadings necessary in criminal prosecutions for violations of the law are not, it seems to us, the proper mediums for advertising private individual enterprises. Suffice it to say, however, that this advertisement is not part of

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the indictment, and does not invalidate it. Nor is the indictment invalidated by the use of the unnecessary caption in writing. The caption is no part of the indictment; it is not essential under our law. *English v. The State*, 4 Texas, 125; 1 Whart. Cr. Law, 6th ed., sec. 219; 1 Bishop's Cr. Proc., 2d ed., sec. 661.

The only other errors complained of relate to the charge of the court. When considered with reference to the facts proven, the charge, which simply presented the law of assault with intent to murder, and self-defence, was amply sufficient. There were no facts demanding a charge on the lesser degrees of assault. On Friday, the day before the *rencontre*, defendant had threatened to kill Gradenton. Again, on Saturday, he renewed the threat, saying he intended to kill him before sundown. Just before the shooting, he is seen by one of his own witnesses approaching the house of Williams with his six-shooter in his hand, and when he reaches Williams's house, with the most abusive and insulting language he called upon Gradenton to come out; and when the latter comes out of the house, he immediately opens fire upon him. It is true, Gradenton returned his fire, and wounded him. This, however, does not in any manner change the nature or degree of his offence. Under the circumstances, had death resulted from his assault, the crime would have been murder in the first degree, — that is, murder containing all the elements of express malice. In a trial for assault with intent to murder, the court should not instruct on aggravated or simple assault unless the evidence calls for such instruction. *Sims v. The State*, 4 Texas Ct. App. 144; *Hines v. The State*, 3 Texas Ct. App. 484; *Crane v. The State*, 41 Texas, 494; *Pugh v. The State*, 2 Texas Ct. App. 539.

As was said by this court in Pugh's case: "When one charged with committing an assault with intent to murder is shown to have given the first insult, and to have begun, him-

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self, the attack which finally resulted in the effort on his part to kill, he cannot mitigate the offence by showing that he attempted to kill under the immediate influence of sudden passion, caused by injuries received from his adversary during the *rencontre*. In this case, as was said in *Crane v. The State*, 41 Texas, 494, the insult, the passion, and the assault were all on the side of the defendant." Independent of his threats, and his deliberate mind and formed design, as evinced by his actions, the offence of defendant could not have been manslaughter, under the evidence, had death ensued; for the law is that, "though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provoked a contest, with the apparent intention of killing or doing serious bodily injury to the deceased, the offence does not come within the definition of manslaughter." Pasc. Dig., art. 2260. So far as the law of self-defence is concerned, there was nothing in the evidence requiring such a charge.

The guilt of the defendant was clearly, plainly, and indubitably established, and we think he has every reason to congratulate himself that the jury affixed his punishment at the lowest penalty (two years) attached to his crime.

There being no error, the judgment is affirmed.

Affirmed.

5	625
28	295
5	625
31	448

EX PARTE SCURRY FOSTER.

1. **HABEAS CORPUS — SECOND APPLICATION.** — An application for a second writ of *habeas corpus* must show that since the hearing in the first application important testimony has been obtained, which it was not possible to get at the former hearing. The application must also set forth the testimony so newly discovered, and if it be that of a witness, the affidavit of the witness must accompany the application.

2. **SAME.** — But such application is not limited to newly discovered evidence. The right is conferred in two classes of cases: 1. Where the applicant has obtained important evidence which, not newly discovered, it was out of

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his power to produce on the former hearing. 2. Where the evidence is newly discovered.

3. **SAME.** — It is not sufficient that the second application be accompanied by the affidavit of the witness, but it must in all things conform to the rule governing applications for new trial based upon newly discovered evidence.
4. **SAME — PRACTICE.** — If the application does not in all things conform to this rule, the court below would be authorized to refuse the writ; and such action would be conclusive, for an appeal does not lie from the refusal of the lower court to grant the writ.
5. **SAME — PRACTICE IN THIS COURT.** — The court below having granted the writ, and, upon hearing the testimony, having ruled that it was not newly discovered, this court, even though it concurs in that view, will not for that reason, or because the applicant was not entitled to the writ, affirm the judgment refusing bail. But, the writ having been granted and the proofs heard by the court below, and the evidence having become part of the record, on appeal this court is required to hear the facts and law arising thereon, and to enter such judgment and make such orders as the law and the nature of the case require.
6. **SAME.** — This court is precluded from revising the action taken below on incidental questions in this class of cases.
7. **RIGHT OF BAIL.** — The Constitution of 1876 provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is evident."
8. **"PROOF IS EVIDENT"** if the evidence adduced on the application for bail would sustain a verdict convicting the prisoner of murder in the first degree; but if the evidence be of less efficacy, bail should be allowed him. In other words, bail is not a matter of right, if the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offence has been committed; that the prisoner is the guilty agent; and that, if the law be administered, he will be capitally convicted.
9. **PRACTICE IN THIS COURT.** — The present case being held bailable, and the record disclosing the prisoner's ability to give bond in a certain sum, deemed reasonable, this court empowers the sheriff to take such bond, with sufficient sureties, and conditioned according to law, and directs that it be filed in the District Court having cognizance of the case.

APPEAL from the District Court of Austin. Tried below before the Hon. L. W. MOORE.

The applicant in this case was charged by bill of indictment with the murder of Nicholas Umland, alleged to have been committed in Austin County, October 13, 1878.

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Sutton testifies, in substance, that his attention was first called to the difficulty, as he was going to the coffee-stand for a cup of coffee, by hearing some angry words near him, and discovered it was Umland (the deceased) and James Foster (a brother of defendant's), standing facing each other, when he heard Umland say, "If that is not sufficient, I am a man," or words of like import, and James Foster replying, "I am, too," or words of like effect. He (Sutton) went to them to make peace, and extended his hands forward and placed the back of his right hand against Umland and the back of his left against James Foster. He heard no other remarks between the parties, and knew by the tone of Umland's voice that he was mad. Just at this moment he saw a hand from his left side, in front, pass him and catch Umland by the right shoulder (Umland having his right hand in his pocket at the time), when he turned and saw that it was the defendant, Scurry Foster, with a pistol in his hand. Just at this time Umland made a plunge forward about two steps, or was jerked forward, and the pistol fired and Umland fell, wounded near the shoulder, and died about an hour thereafter. When witness first saw defendant he was almost directly behind or beside James Foster. All that he saw or heard occurred inside of a minute.

H. C. Ferris testified, in substance, that he and Umland were at the coffee-stand drinking coffee; Umland had finished, and was sitting off on a beer-keg, waiting for him. He was sitting upon another keg, about two feet from Umland. At this juncture James Foster came up, and Umland and he were talking. He heard Umland say, "I have made that up with you two or three times, but if you crowd me, or want anything more,"—or something to that effect,— "I am a man, and will defend myself." Foster replied, "I am, too." He (Ferris) then said to them, "Boys, boys, boys," and went on drinking his coffee.

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The next thing he heard was the report of a pistol, and Umland exclaimed, "Ferris, I am a dead man." He then went to the place where Umland was lying, which was ten or twelve feet from where he (Ferris) had been sitting at the coffee-stand.

Upon cross-examination, this witness states that the first remark he heard from Umland, when he was talking with James Foster, was, "We have made friends over this two or three times, and what is the use of saying anything more about it," or something of that sort; and he thinks he further said, "If you want anything more, I am a man, and by G—d you can get it; I stand in my own shoes;" and James Foster replied, "I am a man, too." The first he saw of James Foster, he was standing near him and Umland, and both were talking. At first Umland was sitting, but when he made those remarks he rose up. James Foster and Umland were standing close together when he heard these remarks. At this time both were so near to him that he could have touched them. He did not see the pistol fired. Thinks the parties were ten or twelve feet from him when the pistol was fired, but he did not observe how they got from where they were when he first noticed them to where they were when the pistol fired. He (witness) was somewhat under the influence of liquor that night. Don't remember any one knocking his hat off that night, and telling him he meant no harm by it.

Joe Nichols's testimony: He was keeping a coffee-stand at the Piney school-house on the night of the homicide. Between three and four o'clock in the morning, Umland and Ferris came to the coffee-stand for coffee. Ferris drank two cups and Umland one. Umland had finished his cup, and Ferris was sitting there mincing his, with his head down, and during this time James Foster came up and slapped Ferris's hat off his head. Umland picked up the hat and put it back on Ferris's head, and said to Fos-

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ter, "Don't be slapping Ferris's hat off that way ; he might get mad." Foster replied, "I am not afraid of making Deacon Ferris mad ; I have known him for a long time." Ferris raised his head then, and said, "No, there was no danger of his getting mad." Foster then said something to Umland, not understood by the witness. Umland then said, "Jim, I have made friends with you two or three times about that thing, and what is the use to keep bringing it up?" Umland then got up and said, "I am a man, and stand in my own shoes ;" and Foster said, "So am I." Then the defendant, Scurry Foster, stepped up and said, "I am right here, ready for anything." Then Umland and Scurry Foster stepped off two or three steps from the coffee-stand, and there were some words passed between them, which the witness did not understand, after which Scurry Foster slapped Umland's jaws. Then Umland either struck him or pushed him. The motion was with the right hand, and seemed to be straight out from his body, and defendant either stepped back or the blow pushed or staggered him back ; and as he stepped or staggered back he reached down in his breast and pulled out a pistol from his vest or coat pocket, inside, presented it, and fired, and Umland fell on his back, and said twice, "Charlie, I am a dead man." Witness heard the click of the pistol as it was cocked. Umland seemed to be in a good humor during the time he was sitting at the coffee-stand. While sitting at the coffee-stand with Ferris, Umland did not use any harsh or profane language about anybody, or make any threats. Saw nothing in Umland's hands during the difficulty. Don't remember that Ferris said anything to anybody while at the coffee-stand. They were sitting there half to three-quarters of an hour before Foster came up.

Upon cross-examination, the witness stated that when James Foster commenced the conversation with Umland he

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seemed to be speaking privately, and in an undertone ; when Umland got up, and said, "Jimmie, we have settled that two or three times, and what is the use of bringing it up again, or throwing it up to him, or keeping talking about it," — or something to that effect — "that, by G—d, he was a man, and stood in his own shoes." At this time Scurry Foster came up, and said, "He was here, and ready for anything ;" and without any further remarks, Scurry Foster and Umland retired six or eight feet from the counter and engaged in a conversation he did not understand, when Scurry Foster slapped Umland's jaws, etc. Saw Sutton, who seemed to be trying to keep Scurry Foster and Umland apart. When he first noticed Sutton he put a hand on Umland and a hand on Foster, and then the slapping was done, and Umland either struck or pushed him. Did not see anybody in the group at this time except Umland, defendant, and Sutton. Did not see anybody catch Umland by the shoulder, and give him a jerk. Thinks he would have seen it if it had occurred.

C. H. Brossman's testimony : He was a brother-in-law of Umland, and witnessed the homicide. While going from the school-house towards the coffee-stand, heard Umland make the remark, "I am a man, and stand in my own shoes." Was six or eight steps from Umland at the time. The remark attracted his attention to the party. Some reply was made by a person standing in front of Umland, that he did not hear. There were three persons in the group besides Umland. As the remark was made, he saw some one of the three stepping between them, and a motion of his hands as if trying to keep them apart. He then saw one of the party, the one furthest from Umland, advance towards him ; saw the barrel of the pistol, the flash, and the fall of Umland. The pistol was in the hands of the party who advanced, and at the crack of the pistol Umland fell.

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When the pistol fired, did not see Umland striking with his hands. Thinks if he had been, he could have seen it. He was excited at the time.

The State also introduced John B. Lewis, deputy-sheriff of Austin County, and the officer who arrested Scurry Foster upon the spot at the time of the homicide, who testified that about an hour or more previous to the homicide he saw deceased having a quarrel with some other parties, and that he had an open pocket-knife in his hand, and that he (the sheriff) requested him to put up the knife; and he replied that he was not armed, that he only had a pocket-knife, and he thought he had a right to keep that in his hand. He then ordered him to put the knife in his pocket, which he did. The knife was an ordinary pocket-knife, with a blade some two or three inches long. After the killing, Mr. Langhammer showed me a knife having the same appearance as the knife I saw Umland have. Ordinarily, I would take it for the same knife. That he was standing in the vicinity of the shooting at the time it occurred, and saw the flash of the pistol; that Foster, after the pistol fired, stepped rapidly backward five or six steps and stopped, and by the time he had stopped he caught hold of him, and wrested the pistol from his hands; that he seemed to be very much excited when he first got hold of him, and said he would shoot any man that tried to cut his throat; that he examined the wound upon Umland. The shot penetrated between the right nipple and collar-bone. The wound seemed to have been slanting, and not directly in front, and ranged in. Previous to the shooting, he had seen Umland take several glasses of beer, and thinks he was somewhat, though not much, excited from drinking.

E. R. Thomas, a witness for the State, testified that he examined the body of the deceased the morning after the homicide, and found a wound on the right side of the body, just below the collar-bone. He examined carefully the

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wound. It ranged towards the left and centre, across the body.

J. A. Traylor, witness for the State, testified that defendant and Umland had some quarrelling and harsh words at a bar-room in Chappell Hill, last Christmas. Witness, as a peace officer, suppressed the quarrel, and Umland went off over across the street, and said something back to defendant, such as that he had acted the d—d rascal, or d—d scoundrel; and Foster replied that he was not able to fight him, but that he would see him another time. The parties were both in drink at the time, and they got together the next morning, through the intercession of friends, and settled their quarrel, and made friends and shook hands over the settlement. Witness saw the parties meet about two weeks afterwards, and their meeting was friendly. Umland, when drinking, was sometimes inclined to be quarrelsome. Witness had known of his having several fights.

W. P. H. Tatum also testified to substantially the same facts as Traylor.

The testimony alleged to have been newly discovered, and upon which the second application is based, is that of the witnesses T. J. Estes, Japhet Collins, James Manning, Henry May, J. W. Moss, Peter Anderson, John Foster, and John D. Cochran, all of whom were at the ball on Piney on the night of the homicide.

Estes testifies that between ten and eleven o'clock in the night he saw Umland show H. C. Ferris a large pocket-knife, and heard him say to Ferris, "This is the only weapon I have, but I will use it;" and that later, between one and two o'clock, he heard Umland and Ferris talking together some time in a low tone, all of which he did not hear (they being three or four feet from him, sitting on a bench), and, while talking, Umland drew from his pocket a knife, and said, "I have no other weapon but this; but you know, Deacon, I am no coward, and am afraid of no man;" and,

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with an oath, said, "I will use it on him." Witness did not hear distinctly the name of the party upon whom the knife was to be used, but from the conversation he believed it to be Scurry Foster.

Japhet Collins testified, in substance, that he was some twelve or fifteen feet from the parties at the time of the homicide, and his attention was attracted to them by loud talking; that he saw James Foster, Scurry Foster, and Umland standing close together; that he saw a motion of the hands between the parties, and immediately he saw defendant going back, and Umland following him up, and that he was advancing at the time the pistol fired; that James Foster seemed to be trying to keep Umland back and prevent a difficulty; that when he first noticed them, James Foster was between Umland and Scurry Foster, but before the pistol was fired Umland had either pushed him aside or passed him. As soon as Umland fell, he (the witness) sprang to him, and heard him say, "I am a dead man;" and also heard Foster (defendant) say "that he would shoot any man that tried to cut his throat;" this remark of defendant's was made immediately after the firing, and just as Umland fell to the ground.

James Manning testified that sometime during the night of the homicide, about eleven o'clock, he was passing by where Umland and Deacon Ferris were sitting on a bench, and he heard Umland say, "If he bothers me, or if he bothers me again, I will stick this in him." That the remarks were made in an angry manner, and seemed to be in earnest. The witness did not know who it was that he was speaking about, nor what it was that he was going to stick in him.

Henry May testifies that he saw the killing, and was about ten or fifteen feet from the parties at the time, and heard them talking, and they seemed to be quarrelling. Scurry Foster said, "Claus, I don't want to have any diffi-

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culty with you ;” and Umland replied, “ I don’t care a d—n. I will cut your d—d throat,” and made a lick at Foster with the knife, which was either a large pocket-knife or a dirk ; he could not say which, as he only saw the blade. When Umland struck at Foster with the knife, Foster began to retreat, and retreated about six feet before he fired at Umland, Umland following him up, still striking at him with the knife. He cut at Foster two or three times before the pistol was fired. This occurred near the coffee-stand. There were several persons standing near by, but could not say who they all were. When he first saw the parties James Foster was between them. When the pistol was fired no one was between them.

J. W. Moss testifies that he was near the parties at the time of the homicide ; that his attention was called to them by loud talking, when he turned and saw Scurry Foster backing and retreating from some one he did not know, but whom he was afterwards told was Claus Umland. It was the same party who was killed. That after Foster had retreated five or six feet he fired at the deceased, who seemed to be advancing towards Foster when the pistol fired. He could not distinguish the words used by the parties. Foster did not fire over or around the shoulders of Thomas Sutton or any one else. James Foster was between the parties when he first saw them. He could not say positively that deceased was walking towards Foster at the time he was shot, but he seemed to be advancing upon him.

Peter Anderson testifies that about five minutes before the homicide he saw defendant and deceased standing talking together, and heard defendant say to Umland, “ I don’t want any trouble with you ;” and Umland replied, “ You d—d s—n of a b—h, I’ll cut your throat from ear to ear.” He seemed to be angry, and had a knife (which he took to be a pocket-knife) in his hand at the time, holding it a little behind him. After Umland was shot, he saw a man come

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up to the body and stoop down and take a knife out of or from near the right hand of deceased, and walk off with it.

John Foster testifies that he saw the pistol that was exhibited at the examining trial as the one with which the killing was done. It was his pistol; and about eleven o'clock in the night he lay down upon a bench and went to sleep, and while asleep, some one took from his person the pistol, and his watch and chain. He got his watch and chain from Scurry Foster, the next morning after he was arrested. He is a cousin of defendant's. Had owned the pistol about three years. Did not claim the pistol at the examining trial. He supposed it had been confiscated.

John D. Cochran testifies that he knew John Foster's watch and chain, and that about twelve o'clock of the night of the homicide Scurry Foster came to him, from towards where John Foster was asleep on a bench, and showed him John Foster's watch and chain, and told him that he had taken his watch and chain and pistol from his person, to keep any one from taking it from him. He did not see the pistol.

Upon the question of the testimony of these witnesses being newly discovered, none of them testify that they had informed either defendant or any of his attorneys of the facts they could testify to, previous to the trial of defendant, upon his first application for *habeas corpus*.

Witness May, upon cross-examination, testifies that he had not mentioned what he knew to any one, except his family, until a week before his testimony was given.

Witness Collins, upon cross-examination, testifies that he was called upon at the examining trial as a witness, for the purpose of identifying Claus Umland as the man who had some words or a difficulty with a Mr. Calhoun on the night he was killed, but was not examined in reference to the difficulty between Umland and Foster; that he never told defendant, or either of his attorneys, that he knew anything

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about the circumstances of the homicide until after the first trial upon *habeas corpus*.

Witness Estes, upon cross-examination, testifies that it was some three or four days or a week after the homicide before he spoke to any one about what he had heard. Then he told N. Cochran and Miller Francis about it. It was after the examining trial that he told it. Don't know whether it was after the first trial upon *habeas corpus* or not. He had not tried to keep it a secret.

None of the other witnesses stated nor were questioned in regard to the time when they first communicated what they knew about the homicide.

Foster, in his second petition for writ of *habeas corpus*, states that the testimony of these witnesses has been discovered since his first application ; and he swears to the truth of his petition.

James Foster testifies that he is a brother of defendant's, and that he was present when Umland was shot ; that in passing from the school-house to the beer-stand, he saw his brother, Scurry Foster, Ferris, and Claus Umland at the coffee-stand. He heard a loud voice, and recognized it to be that of Umland, and knowing his disposition when drinking, he went there and found Umland and defendant quarrelling, and he caught hold of defendant and pushed him back and told him to go away, that he would talk to Umland. He asked Umland what they meant by quarrelling ; that they were old friends, and there was no use in having a row. Umland then got up from his seat, and said, " I am a man, and stand in my own shoes, and will cut his G—d d—d throat," and rushed towards defendant, and struck over witness's left shoulder at defendant with a knife. Witness stopped him, and told him he was a man, too, and that they were all men, and don't want any row. Umland then made a second attempt to go to him, and caught witness by the coat with his left hand and made a lick at defendant

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with his right hand, and immediately after that the pistol fired. When he first went up to the coffee-stand, where Umland and defendant were talking, Umland was sitting down sideways towards the coffee-stand, with an open knife in his hand, with the blade turned back. When Claus and my brother were quarrelling at the coffee-stand, they seemed to be angry. The first that attracted his attention was Umland cursing. He did not hear what defendant said, as he did not give him time before he pulled him away. Witness had a cut in his coat, in front of the lower right hand pocket, and did not know how it came there, unless done by Umland at the time of the difficulty. It was a new, thick, woollen coat. He had not stopped at the coffee-stand before during that night. He had not knocked off Ferris's hat, or put his hand upon his face in any way that night at the coffee-stand. Did not know nor never had heard of any previous trouble between defendant and Umland. They had known each other about fifteen years. As he (witness) was talking with Umland, he saw Sutton standing two or three feet off. The knife Umland had in his hand seemed to be a pocket-knife, with a buckhorn handle. He held it in his right hand.

Kinchen Collins testified that he was at the barbecue and ball at the Piney school-house, on the night of the homicide, and saw Claus Umland there. He last saw him at the beer saloon, some twenty or twenty-five minutes before the shooting, and thought he was considerably intoxicated. The last time he saw him, he was sitting at the coffee-stand upon a lager beer keg. Between three and four o'clock in the morning, and not exceeding fifteen minutes previous to the shooting, witness drove up to the beer saloon to get his brother, and Umland came up to his buggy, where he was sitting, and among other subjects of conversation, said "that he and Scurry Foster had had a difficulty, and that it was not over with yet; and that if it came up again, he

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was going to hurt somebody, and hurt somebody d—d bad.” About twelve o’clock that night he saw a difficulty between Umland and Mr. Floyd, and Umland had an open knife in his hand, and held it behind him. Witness saw the knife. It had a buckhorn handle, not very new, and whetted up pretty sharp. Witness was then shown a knife, claimed to have been taken by Sheriff Langhammer from Umland, after he was shot, and stated that he thought that it was the same knife he saw Umland have. He did not speak of the conversation with Umland until after the shooting.

Frank Ford testified that he was at the barbecue and ball at Piney school-house, and, as he supposed, about three-quarters of an hour before the shooting, he passed by Umland and Ferris, sitting at the coffee-stand, and heard Umland remark “that he intended to cut Scurry Foster’s d—d throat before day.” He did not know Umland at the time. He (witness) passed on, and soon met Scurry Foster, and told him of the remark, and he asked who it was, and he turned around and pointed out the man to Foster that had made the threat alluded to, and Foster informed him who the man was. There was a large crowd on the grounds at the time, and people were constantly passing and repassing.

Levi Rogers testified that he resided at Chappell Hill. Had known Claus Umland for quite a number of years. The Friday night before the Saturday night that Umland was killed, he saw him at a grocery in Chappell Hill, and Umland told him (the witness) that he was going down into Austin County to attend a barbecue and dance, and that he didn’t know that he ever would get back again, but that he was going prepared. Umland, when in drink, was inclined to be quarrelsome.

Charles Langhammer testified that he was the sheriff of Austin County, and was about fifteen or sixteen feet from

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Umland at the time he was shot; that he went to him in about ten minutes after he was shot. Did not notice the position of his hands at the time. He then went off, and returned again in not exceeding five minutes, and found him lying on his back, and his left hand resting on his body. He had a knife in his left hand. The knife was open. (The knife was here exhibited.) The knife was in such a position that he did not see it until he raised the hand. Does not know which way the blade was pointed, nor whose knife it is. It is the same knife he had shown to John Lewis. Would judge the blade to be from two and one-quarter to two and one-half inches long, and the handle about three inches long.

Upon cross-examination, witness said he did not know how the knife came in Umland's hand. The knife was loose in the hand. When he raised the hand the knife came with it, but there was no resistance when he took the knife out. There were a great many people around when he took the knife out of the hand. There had been a great many people around the body whenever he approached it, going and coming. The knife is one that had been used a good deal; has been whetted up, and is considerably worn. Noticed Ferris washing the face of the deceased. He took Umland to be dead when he took the knife out of his hand.

Lucien Collins testified that, about a half-hour before the shooting, he saw H. C. Ferris sitting on a lager beer keg at the coffee-stand, and he took him to be drunk. He (witness) stepped up, and slapped him on the back or shoulder, and said, "Hello! Ferris, what are you doing here?" and he replied, "I am just resting myself." Witness wanted to talk to him, but he did not seem to notice much, and he went off and left him. He was then in a stupid condition. Could not say whether it was caused from drinking or want of sleep. Had seen Ferris about two hours before

Argument for the appellant.

the homicide. He was drinking, but did not notice his being intoxicated then.

John D. Cochran testified that he saw H. C. Ferris about two hours before the shooting. Had some conversation with him, and thought he was considerably intoxicated.

G. E. Miller testified, for the State, that he saw Umland inside of three minutes after he was shot. He was still alive, and his hands lying out from the body on the ground. They were neither clenched nor open. The palms of the hands were up. The right hand was over a foot, and the left four or six inches from the body. Did not notice anything in his hands; nor did he notice, in particular, to see if anything was in his hands. From the position of his hand, did not think it would have held a knife if it had been raised over on his body.

J. P. Bell and Chesley & Haggerty, for the appellant. Scurry Foster stands charged with the murder of Claus (or Nicholas) Umland, in Austin County, on October 13, 1878.

He was arrested at the time of the homicide, and committed to the county jail of Austin County by the committing magistrate, sitting as an examining court.

October 31, 1878, District Judge L. W. MOORE, on the hearing in chambers upon return of writ of *habeas corpus*, refused to grant bail to said Foster.

At the December term, 1878, of the District Court of Austin County, he was indicted for the murder of Umland, and the case was continued.

January 29, 1879, a second writ of *habeas corpus* was applied for by Foster, and awarded by Judge Moore, upon the ground of newly discovered testimony; and, upon the hearing in chambers, bail was again refused, and Foster brings the case to this court by appeal.

Argument for the appellant.

The fact of the commission of homicide is conceded, and appellant predicates his right to bail under the law, upon the following propositions, viz.:

First, That there is not sufficient testimony, as exhibited in the record, to make out an "evident" case of express malice upon his part in the commission of the homicide.

Second, That the court, in chambers, erred in refusing to pass upon and consider the material and alleged newly discovered testimony upon which the second application for bail is predicated, upon the ground that, in the opinion of the court, it was not in point of fact newly discovered, and that the same, if it had been considered, would have necessitated the granting of bail.

Third, That the testimony concerning the facts of the homicide, as exhibited in the whole record, shows affirmatively the absence of express malice.

We will premise the statements in connection with these propositions by the general statement that the homicide, according to the testimony of all of the witnesses, occurred late in the night-time, upon the occasion of a public barbecue in the day-time and ball at night, given in the open air, at the Piney school-house, about two miles from Bellville, on the day and night of October 13, 1878, at which there was a large crowd of persons in attendance, and was committed openly, without any attempt at concealment or escape, and in the presence of numerous bystanders. Beer had been drunk freely upon the ground during the night, and adjacent to the beer-stand was a coffee-stand, each of which was reasonably well lighted.

Authorities under first proposition: Bill of Rights (Const. 1876), art. 1, sec. 11; Pasc. Dig., arts. 2266, 2267; *McCoy v. The State*, 25 Texas, 33; *Ake v. The State*, 30 Texas, 466; *Farrer v. The State*, 42 Texas, 265; *Murray v. The State*, 1 Texas Ct. App. 417; *Plasters v. The State*, 1 Texas Ct. App. 673.

Argument for the appellant.

Statement under second proposition: The court, in the certificate of approval of the statement of facts, qualifies the approval "with the explanation, that the only new testimony introduced was that of the witnesses whose names appear in the application; and, though admitted, was not deemed by me as newly discovered, so far as material."

Also, in the judgment, the court recites: "It appearing to the court that the evidence introduced by the applicant, alleged to be newly discovered, was not in fact such evidence, and accordingly not sufficient to authorize the court to change the former judgment of the court refusing bail, and for other sufficient reasons, it is ordered and adjudged by the court that the prisoner, Scurry Foster, be remanded to the custody of the sheriff," etc.

Authorities under second proposition: Pasc. Dig., art. 2585-2588, 2625, 2627, 2641, 2642; 2 Pasc. Dig. of Dec. 359, sec. 14, and cases cited; *Hibler v. The State*, 43 Texas, 199; Cooley's Const. Lim. 347; Freem. on Judg., sec. 324; 1 Bla. Com. 134-136; 3 Id. 133-138.

Statement under third proposition: In support of this proposition, we refer to the statements under the two preceding propositions; also, to the testimony of the witnesses James Foster, Kinchen Collins, Frank Ford, Levi Rogers, Charles Langhammer, Lucien Collins, and John D. Cochran, witnesses for defendant; which testimony was introduced by defendant before the examining court, and was given in evidence before the district judge upon both trials upon *habeas corpus*. Also, the testimony of G. E. Miller, a rebutting witness, offered by the State upon the examining trial, and whose testimony was before the district judge upon both applications for bail.

Authorities: Same as under first proposition; *Primus v. The State*, 2 Texas Ct. App. 369.

Thomas Ball, Assistant Attorney-General, for the State.

Opinion of the court.

WHITE, J. This appeal is from a judgment rendered upon a second application for *habeas corpus*, refusing bail to applicant. The first application was made and heard before indictment found, and the application in this case after indictment. Applicant's right to a second writ of *habeas corpus* was based upon the ground of newly discovered evidence.

Upon the hearing in chambers, the district judge rendered the following judgment, viz.: "It appearing to the court that the evidence introduced by the applicant alleged to be newly discovered was not in fact such evidence, and accordingly not sufficient to authorize the court to change the former judgment of the court refusing bail, and for other and sufficient reasons, it is ordered and adjudged by the court that the prisoner, Scurry Foster, be remanded to the custody of the sheriff of Austin County, to be by him confined, without bail, to answer the indictment preferred against him by the grand jury of said county, charging him with the murder of Nicholas Umland," etc.

With regard to second applications for the writ of *habeas corpus*, our statute reads thus: "A party may obtain the writ of *habeas corpus* a second time by stating in the application therefor that since the hearing in his first application important testimony has been obtained, which was not in his power to produce at the former hearing. He shall also set forth the testimony so newly discovered; and if it be that of a witness, the affidavit of the witness shall also accompany such application." Pasc. Dig., art. 2642.

A casual reading of the language of this statute might lead to the inference that such second applications would be limited exclusively to evidence which was newly discovered. Such, however, is not our interpretation, based upon a proper construction of the whole article, and, as we think, in perfect consonance with the broad principles of justice and human liberty upon which the writ is founded, and for

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the better protection and security of which its privileges were intended mostly to subserve. We are of opinion that the statute intended to confer the right in two classes of cases: First, where important testimony has been obtained, which, though not newly discovered, or which, though known to him, it was not in his power to produce at the former hearing; second, where the evidence was newly discovered.

In either case his application, if it be on account of the testimony of a witness, should not only be accompanied by the affidavit of the witness, but the reasons why the testimony was not adduced should be fully stated, in order that the judge or court to whom the application was addressed might know, in the one case, why it was out of his power to produce it at the former hearing, and in the other, such facts stated as would satisfy the court that the failure to discover the testimony was not attributable to any lack of proper diligence on his part; in other words, the application should be so full and complete as to apprise the court of all the facts necessary to be known, that it might act advisedly in granting or refusing the application.

We cannot better, perhaps, illustrate our idea than by the facts presented in the case at bar. As we have seen, the application was upon the ground of newly discovered evidence. In such a case, we take it, all the recognized rules with reference to newly discovered testimony on motions for new trials would obtain and govern. The showing should be the same. If the showing itself discloses, we will say, want of diligence, or that the evidence is cumulative, or that it was intended to impeach a witness, or any other fact which would render it insufficient or invalid on a motion for new trial, then the judge or court would be fully authorized in refusing the writ, and his refusal would be conclusive; for an appeal does not lie from the refusal of a district judge to grant a writ of *habeas corpus*.

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Ex parte Ainsworth, 27 Texas, 731; *Thomas v. The State*, 40 Texas, 6.

In this case, however, the judge granted the writ; and then, upon the hearing, determined that the evidence was not newly discovered. A question is here presented which has never before arisen in this State, and that is, What should be the practice in this court on appeal, even supposing the court should concur in the view of the District Court that the evidence was not newly discovered? Will we affirm the judgment because the party was not primarily entitled to the writ? Clearly not. Having granted the writ and heard the testimony, the evidence thus heard becomes part of the facts of the record. The rule of practice as prescribed by the statute applies: "The Supreme Court [Court of Appeals] shall hear the appeal upon the facts and law arising upon the record, and shall enter such judgment and make such orders as the law and the nature of the case may require." Pasc. Dig., art. 3221. "The opinion of a district or supreme judge shall not be revised as to any incidental question which may have arisen on the hearing of the application for *habeas corpus*, the only design of the appeal being to do substantial justice to the party appealing." Pasc. Dig., art. 3222.

The case, then, must be determined by us, not upon the question as to whether the evidence is newly discovered, but upon the evidence as we find it adduced on the hearing and presented in the record.

Taking the record as an entirety, and considering all the testimony as it here appears, is the prisoner entitled to bail? Our present Constitution provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is evident." Const., art. 1, sec. 11. What is the proper definition to be given and the legal interpretation to be placed upon the words, "when the proof is evident," as used in the constitutional provision quoted,

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has been a most fruitful source of discussion with the legal profession of the State since the adoption of the Constitution of 1869, where the same language is used as in the present Constitution. No legal construction has ever been directly given it. In the case of *Ex parte Rothschild*, 2 Texas Ct. App. 560, this court promised to avail itself of the first suitable case to discuss the meaning of these words, and to declare the rules which would regulate and govern the action of this court in its adjudications upon *habeas corpus* cases.

In *McCoy v. The State*, 25 Texas, 33, our Supreme Court gave their interpretation of the meaning of the expression, "proof is evident or presumption great," as used with reference to bail, in the ninth section of article 1 of the Constitution of 1845. Roberts, J., says: "The terms * * * are as definite to the legal mind as any words of explanation could make them, and are intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases, except in those in which the facts might show with reasonable certainty that the prisoner is guilty of a capital offence."

The omission of the words, "or presumption great," and the use of the expression, "proof is evident," in the present Constitution, it is contended, materially change the rights of a prisoner, and require, to justify a refusal of bail, the establishment of a much more direct and certain case of guilt than formerly. Doubtless this is so. Some, however (able lawyers), go to the extent of insisting that a mere conflict of testimony will necessarily entitle a party to bail, since that cannot be said to be evident which admits of dispute; and the case of *Ex parte Miller*, 41 Texas, 213, is frequently cited in support of this position. When examined with reference to the facts of the case before the court, and which were the facts to which alone the language of the

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opinion relates, or even independently considered, we do not think the rules therein laid down warrant such construction.

Again, it is insisted that the only true and correct meaning of the word "evident" is that given it by lexicographers whose works are recognized as of standard authority. Take, for instance, the definition given by Webster, and we believe his definition is about the same as that of most standard authors. He defines "evident" to be, "*clear to the mind; obvious; plain; apparent; manifest; notorious; palpable.*" This is very satisfactory, is doubtless accurate and correct, and, as we shall endeavor to show hereafter, not inconsistent with our view of the constitutional expression, "proof is evident," even when subjected to philological construction. Perhaps we cannot succeed better in making ourselves understood than by declaring the general rules which will control and govern us in refusing bail, under the constitutional prohibition, than by attempting to announce a definite abstract meaning for the constitutional expression, which is not easily defined.

The Supreme Court of Pennsylvania have laid down a rule upon this subject which we think worthy of approval. In *The Commonwealth v. Keeper of Prison*, 2 Ashm. 227, it is said to be "a safe rule, where a malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and, in instances where the evidence of the Commonwealth is of less efficacy, to admit to bail." 2 Ashm. 227; Hurd on Habeas Corpus, 438; *The State v. Summons*, 19 Ohio, 139; *Ex parte Bryant*, 34 Ala. 270.

The same idea is tersely and happily expressed by Brickell, C. J., in *Ex parte McAnally*, 53 Ala. 495. He says: "If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offence

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has been committed; that the accused is the guilty agent; and that he would probably be punished capitally if the law is administered, bail is not a matter of right." See also *Ex parte Nettles*, Sup. Ct. Ala., A. D. 1878.

We know of no better exposition of our views with regard to the proper construction of the constitutional expression, "proof is evident," than the two rules quoted; and when subjected to strictest criticism, we cannot see that they are in anywise inconsistent with the definition quoted from Mr. Webster. Besides this, they furnish ample restrictions to regulate and govern the action of the courts in their adjudications upon questions of bail in capital cases.

When we apply the doctrine thus enunciated to the facts in evidence, as shown in the record before us, we are not satisfied that "the proof is evident." Consequently, we believe that the applicant is entitled to bail. We do not wish to be understood as saying that he is not guilty of murder in the first degree, and that this fact may not be made to appear most fully upon his final trial. We are only passing upon the sufficiency of the evidence as exhibited in this record, and upon it alone is our opinion predicated. We will not comment upon it, lest our comments should influence the final trial; to decline to do so is the uniform practice, as it has always obtained in such cases.

In the record we are furnished with an agreement of counsel for the State and applicant, that applicant can give a bond in the sum of \$5,000. The court have, therefore, concluded that the sum of \$5,000 would be proper in the premises. It is, therefore, ordered and adjudged by the court that the applicant, Scurry Foster, be admitted to bail in the sum of \$5,000, with good and sufficient sureties, and that this judgment of the court be certified to the sheriff of Austin County, the officer having custody of said applicant, who is authorized and empowered to receive a bail-bond for

Syllabus.

that amount, properly executed, and conditioned as the law requires; which said bail-bond, when so executed and approved by said sheriff, shall be filed by him in the District Court of said Austin County.

Bail granted.

5	649
30	871
31	287

DAVE DRAKE v. THE STATE.

1. **JURY — SPECIAL VENIRE.** — Under the law regulating the organization of juries in capital cases, the defendant is entitled to be served with a list only of the persons summoned whose names appear on the writ of special *venire*.
2. **SAME — CASE STATED.** — It is shown by the bill of exceptions that eight jurors had been empanelled out of the original special *venire*, when it was exhausted, and a new *venire* ordered. When the return was made, and the names on this second *venire* were called, the defendant claimed the right to challenge and strike out from the eight jurors empanelled from the first *venire*; which the court refused to permit him to do. *Held*, that after the eight jurors had been properly empanelled, neither party had the right to peremptorily challenge any of the eight, and that the court did not err in refusing to permit such challenge.
3. **ORGANIZATION OF JURIES.** — In the organization of juries in capital cases, section 22 of the jury law of 1876 does not apply.
4. **SAME — PRACTICE.** — In the organization of a jury to try a capital case, the names of the persons summoned must be called in the order in which they appear upon the list, and when found qualified, they are to be challenged peremptorily or for cause, or accepted severally, as each one is determined to be qualified by the court; which is to be continued until the jury is completed.
5. **SAME.** — When a juror is thus accepted, it is not within the power of either party to challenge him peremptorily, whether the jury is full or not.
6. **SAME.** — There may be, however, discretion in the court to excuse or stand aside a juror, after he has been accepted, for good cause shown at the time why the juror should not serve.
7. **EVIDENCE.** — The court did not err, in a trial for murder, in excluding evidence for the defence going to show that the deceased had made threats against the brother of defendant.
8. **CHARGE OF THE COURT.** — See the opinion for statement of facts in a trial for murder, and for a charge thereupon, which is *held* to be correct on the law of manslaughter and self-defence.

Argument for the appellant.

9. **SAME.** — There being no evidence tending in the remotest degree to show that the deceased was armed when the defendant shot him, it would have been error had the court charged, as asked, that if the jury believed that the deceased was armed at that time, and conducted himself in such manner as to lead a reasonable man to believe he intended to use such arms against the defendant, they should acquit.
10. **CONTINUANCE.** — The fact that an absent witness, desired by the defendant, had been duly subpoenaed by the State did not dispense with such diligence as would entitle the defendant to a continuance.
11. **NEW TRIAL — CASE STATED.** — A new trial was asked upon the affidavit of two persons, setting forth that one of the jurors was incompetent because of defective hearing and deficient understanding of the English language. An affidavit of the defendant disclaimed knowledge of this incompetency until after the trial. The explanation of the court below shows that the juror, before being placed upon the jury, was subjected to the usual examination. *Held*, that the motion for a new trial was properly overruled.
12. **PENALTY.** — A life-term in the penitentiary does not transcend the legal punishment prescribed for murder in the second degree.

APPEAL from the Criminal District Court of Galveston.
Tried below before the Hon. G. Cook.

The appellant was charged by indictment with the murder of Henry Snowball, by shooting him with a pistol, in the county of Galveston, on March 4, 1878. The jury found him guilty of murder in the second degree, and assessed his punishment at confinement in the penitentiary during his natural life. A lucid statement of all material facts will be found in the opinion of the court.

B. R. A. Scott, for the appellant. 1. On the first point, it appears that as many as thirteen of the special *venire* first ordered were returned not found, and only eight of the jurors who tried the case could be empanelled out of it. Not until this *venire* was exhausted was a new *venire* ordered by the court, from which the jury was finally completed.

The defendant here desired to challenge peremptorily among the eight, as well as the new *venire* to be selected from; which was denied him.

We submit that the *venire* should have been filled before

Argument for the appellant.

proceeding to empanel the jury (Pasc. Dig., art. 3030; Laws 1876, p. 83, ch. 76, sec. 23), and that the defendant had the right to challenge peremptorily among the eight first taken, upon cause (Laws 1876, p. 28, ch. 76, sec. 22,), and even after they were accepted and empanelled. *Hubotter v. The State*, 32 Texas, 843. For otherwise he would be led to exhaust his challenges on a partial venire in the first instance, and, in the second place, be forced to challenge peremptorily before the jury are examined for cause, contrary to section 22, above referred to, and be denied the right to set aside by peremptory challenge a juror he might distrust personally, even after having accepted him; which privilege was granted the State in the case above named.

2. The second point of objection, so far as we have read, is a new one, and founded mainly in reason and justice.

The State attempted to make out a case of murder in the first degree, by showing malice in defendant's arming himself with a deadly weapon before starting to Snowball's house. Defendant, after showing resentment and anger towards Holmes on the part of deceased, a quick-tempered, large, able-bodied man, carrying arms about him, and that he (defendant) occupied his brother's place temporarily, as Holmes's manager, proposed to show, in excuse for arming himself, that deceased had made dangerous threats against his brother, Tom Drake, as Holmes's manager (and presumably against defendant himself, or any one connected with Holmes). There is no doubt but if Tom Drake had been on trial, this evidence should have been admitted. Whart. Cr. Law, 3d ed., 296, and references. And the only question remains, whether the *reason of this law* fairly applied to defendant's case. We submit that it does; for, standing in his brother's place in all respects, as between Holmes and deceased, subject to the same feelings of resentment from deceased as his brother could have

Argument for the appellant.

deserved, and knowing deceased's disposition and dangerous character, defendant had the right to anticipate violence in demanding Holmes's horse from Snowball, and on the trial to show every excuse he could for arming himself, to rebut the unfavorable presumption arising from such preparation. Nor does the fact that defendant was acquitted of murder in the first degree cure this error; for, being tried for that offence, the jury, on the evidence allowed to defendant, found a less penalty, and if this evidence had been admitted, might have found still more in his favor.

3. The court erred in not granting the continuance asked by defendant. We submit that the motion met the requirements of the statute substantially (Pasc. Dig., arts. 2907, 2987), and that the evidence, under the aspect of the case, after the State had proved that defendant armed himself and said he was going to get the mare, became material as part of the *res gestæ*, to show defendant's avowal of none but peaceable intentions in going to Snowball's house, though *advised* to prepare for a difficulty.

True, the witness Reymond was subpoenaed by the State; but, inasmuch as if he had attended, the defendant would have been entitled to a recognizance for his testimony (Pasc. Dig., art. 2915), the fact of the district attorney waiving his attendance (for reasons of his own) should not have obliged defendant to have used the extreme caution of summoning a witness purely to rebut evidence that he could not know, until the day of trial, would be produced. It operated as a surprise, therefore, and defendant should have had a new trial, after the continuance was refused.

4 and 5. The charge of the court dwells upon murder as if that were actually committed, and fails to define the law of manslaughter *fully*, as the evidence called for. Only the first cause, for anger, rage, etc., under article 2554, Paschal's Digest, was given by the court, when, under the evidence of deceased's personal strength and the use of weapons upon

Argument for the appellant.

defendant, the court should have given the second cause stated in the statute, also giving the defendant the benefit of a doubt whether the first shot inflicted the mortal wound, or even whether that were not fired accidentally, in taking out the pistol, in his excitement. There was no evidence of deliberate aim.

The court should also have given defendant the benefit of apprehension from deceased's wearing small arms (as a der-ringer) upon his person, and of the previous threats and passionate disposition of deceased, as circumstances disproving malice.

6. The court erred in not granting a new trial on account of the incompetency of the juror H. F. Hansen, who was both deaf and unacquainted with the English language.

This juror was one of the first empanelled, among whom defendant desired to challenge peremptorily.

His incompetence may be regarded as established from the affidavits appended to the motion, as well as unknown to the defendant at the time of the trial. And the explanation of the judge is both impertinent to the matter of the exceptions, referring, as it does, to matter *dehors* the record in this case, and comparatively unreliable.

The defendant went to trial without a hint of this juror's double infirmity, and now asks this court if it is competent for a judge to pass finally upon the qualifications of jurors at large in a culprit's absence, and not allow him to question or countervail such private opinion afterwards. *Hanks v. The State*, 21 Texas, 527; Pasc. Dig., art. 3040.

7. Finally, we submit that the sentence is too severe for the crime proven, and shows a bias against the accused in the minds of the jury; not calculated to be diminished, either, by the rulings on the trial. Truly, a life of imprisonment lets little more hope through it than the dread sentence of death itself. Both *freeholds of darkness*, "of indeterminate

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duration." Fifty, seventy-five, or even a hundred years were better than the shutting out of every prospect that makes life endurable.

If fairly tried and legally convicted of a crime deducible from the whole admissible evidence, the defendant would naturally expect the vindication of the law upon his liberty to some certain extent, and could not complain, but in view of the errors of trial against him, "his punishment is greater than he can bear."

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant, Dave Drake, was indicted at the March term, 1878, of the Criminal District Court of Galveston County, for the murder of one Henry Snowball. He was tried at the May term, 1878, of said court, convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for the term of his natural life.

The defendant appealed to this court, and has assigned a number of errors committed by the court below on the trial, for which he insists that the judgment rendered herein must be reversed.

The first point urged in his behalf is, that "the court erred in not having the *venire* completed before compelling the defendant to begin the selection of a jury, as such ruling prevented him from having a full *venire* to select from." It appears from the record that the court below ordered the sheriff to summon sixty men, whose names were given in the writ of special *venire facias*, to be and appear before the Criminal District Court of Galveston on the day set for the trial of this cause, out of whom to select a jury. No exception is taken to the manner in which the names of the sixty persons in said *venire facias* were obtained. The sheriff executed said writ, as shown by his return, by summoning

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all the persons named except thirteen, who could not be found. On the day set for the trial, when the case was called, the persons who had been summoned on the special *venire* were called for the purpose of empanelling a jury, and no objection was made on the part of the defendant that he did not have a full *venire* of sixty men to select from, or that he had not been served with a list of the persons summoned upon said special *venire*. This court has held that, under the law now in force in this State for organizing juries in capital cases, a defendant is only entitled to be served with a list of the persons summoned whose names appear on the writ of special *venire*. It is not pretended that this right was not accorded to the defendant. *Harrison v. The State*, 3 Texas Ct. App. 558.

The second point is, that "the court erred in not allowing the defendant to strike from the *venire* first ordered, after a second *venire* had been ordered, because the defendant was entitled to twenty peremptory challenges, and the ruling of the court prevented the exercise of that right, and compelled him to stand a trial before men whom he would have challenged, when he yet had the right to peremptory challenge, said right of challenge being demanded before the jury had been empanelled or sworn." There is a bill of exceptions in the record, taken by the defendant, which recites the following facts: Eight jurors had been empanelled out of the original special *venire* when it was exhausted, and a new *venire* was ordered; and when the return thereof was made, and when the persons on this second *venire* were called, the defendant by his counsel claimed the right to challenge and strike from the eight empanelled out of the original *venire*, as well as from the new *venire*; which the court would not allow him to do. After both parties had accepted the eight jurors, and they had been empanelled, neither party could challenge peremptorily among the eight.

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Our Code of Criminal Procedure provides as follows :

“ Art. 3016 (Pasc. Dig.). When there is pending in any District Court a criminal action for a capital offence, the district attorney may, at any time after indictment found, on motion, obtain an order for summoning any number of persons, not less than thirty-six nor more than sixty, as may be deemed advisable, from whom the jury for the trial of such capital case is to be selected.”

“ Art. 3024. In forming the jury, the names of the persons shall be called in the order they stand upon the list; and if present, shall be tried as to their qualifications, and, unless challenged, shall be empanelled.”

Section 22 of chapter 76, page 82, of General Laws of 1876 does not apply, as is contended for by counsel for defendant, in the organization of juries in capital felonies. Both our Supreme Court and this court have passed upon the exact question raised in this assignment. The Supreme Court, in the case of *Horbach v. The State*, 43 Texas, 260, held that, in empanelling a jury in a capital case, the names of the persons summoned should be called in the order they stand upon the list, and when found qualified they are to be challenged, either peremptorily or for cause, or accepted severally, as each one is determined by the court to be a qualified juror; which is to be continued, one by one, until the jury is fully formed, to the number of twelve. And the court say: “ We know of no law, or established practice under the law, which sanctions the peremptory challenge of a juror by either party when thus placed on the jury, whether it is full or not. There may be discretion in the court for excusing or standing aside a juror after he is thus selected, for some good cause, shown at the time, why the juror cannot or ought not to serve on the jury.”

And this court, in the case of *Baker v. The State*, 3 Texas Ct. App. 532, in construing said article 3024, said: “ This clearly indicates that each person is to be examined

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separately, and subject to challenge, either for cause or peremptorily, separately, and that these things are to be done before the person is empanelled; and that to challenge afterwards would not be allowed, except for cause not discoverable on the examination of the person, and set out in the application for leave to challenge." The judgment of the District Court in each of the above cited cases was reversed because peremptory challenges were allowed to jurors after they had been empanelled as jurors.

The fourth assignment is, that "the court erred in refusing to allow the defendant to prove threats against T. F. Drake, the brother of the defendant and the manager of the Holmes place, when it had already been shown that T. F. Drake had gone to the city of Galveston and left the defendant in charge of said place, because the defendant was thereby placed in the capacity of his brother, and subject to the same orders of his principal which had offended the accused, and about which orders the difficulty occurred." We know of no rule of evidence under which threats by deceased against T. F. Drake would be admissible on the part of Dave Drake, in his justification for killing the deceased. The bill of exceptions taken to the rulings of the court in refusing to permit the witness Matthews to prove threats against T. F. Drake by the deceased does not state what the threats were which defendant desired to prove, or that there were any threats made by deceased to take the life of T. F. Drake.

The next assignments of error relate to the charge of the court. In order to a proper understanding of these points, it will be necessary to give the substance of the testimony as it appears by the statement of facts.

The deceased and defendant resided in Galveston County. The occupation of deceased was that of a nurseryman. T. F. Drake, or Tom Drake, as he is generally called by the witnesses, was in the charge of the Holmes place, and

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Dave Drake, the defendant, stayed with him on the place. The deceased lived about one and a-half miles from the Holmes place. Holmes lived in the city of Galveston, and sold flowers and shrubbery for the deceased. On the day of the killing, T. F. Drake had gone into the city and left Dave Drake in charge of the Holmes place, with orders not to permit anything to go off of the premises without a written order from Mr. Holmes.

Blount, a colored boy living on the Holmes place, was sent by the defendant on one of Holmes's horses (a mare) to the Perkins place, which adjoined the premises of the deceased, for some oats with which to feed the horses on the Holmes place. Snowball took the mare from Blount. The boy Blount returned home on foot, and informed the defendant that Snowball had taken the mare from him. Defendant then went to the head of the bed, in another room, got his pistol, buckled it on him, and said he would go over and get the mare.

Joseph Snowball, a son of the deceased, testified that "on the 4th of March, A. D. 1878, my father, Henry Snowball, had been out in his garden working. He went in and got dinner, and was sitting on the steps of his house, and had been sitting there about a quarter of an hour, when defendant, Drake, came in and said to Henry Snowball: 'By G—d, Snowball, what are you about?' Snowball replied, 'I know what I am about, and I am responsible for what I have done.' Dave Drake then commenced cursing him, and called him a G—d d—d s—n of a b—h. My father told him he must not curse him in that way on his own premises, and that if he would go out of the gate he would talk to him, but that he would not be sworn at in any such way on his own premises. Drake continued to curse and abuse him. My father told him to go off his premises several times, but he would not go. My father then pushed him, by putting his open hand on Dave Drake, and had

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pushed him about half-way from the house to the gate when Dave Drake drew a pistol, a six-shooter, from under his coat, and shot my father, Henry Snowball. The ball entered his left side, passed through his body and right arm. I saw him (Snowball) put his hand up to his side. I also saw the blood. My father then started for the house, and Dave Drake again shot at him. * * * My father got his shot-gun, that was in the house, and came out. Defendant, Dave Drake, was behind the stable, and shot two other shots at my father, and one at me. My father then shot Dave Drake in the hand. * * * My father then became weak, and began to stagger, and I took him into the house. He died on the next day, about ten o'clock; he died of the wound received from Dave Drake; he had no weapon of any kind on him. * * * My father, the day before, had taken from a negro boy one of Mr. Holmes's horses, and brought him home, and intended to write to Mr. Holmes about it the day he was shot. Several of Mr. Holmes's horses had died, and they were abusing this one, and father took him to take care of him for Mr. Holmes."

Mrs. Snowball was also sworn, as a witness for the State, and testified that she "was wife of the deceased. Was present when deceased was shot; he was in his own yard. Saw Drake, who was using abusive language to deceased, who said he would not be cursed in his own yard. Saw Drake draw his pistol and shoot deceased. The first shot took effect; the second shot passed into the house. Deceased got his gun, after being shot, and shot one time at Drake, who continued to shoot at deceased. * * * Deceased first put his hand on Drake's shoulder and pushed him, when Drake shot him. Deceased had a pistol in his house, but did not have any arms of any kind on his person when he was shot."

Mrs. Nettie Perkins, a witness for the defence, testified that she "heard bad language, and heard deceased tell Drake that he must not use such language. Drake said he

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wanted to talk reasonably. Deceased pushed Drake about half-way to the gate; was pushing him with his open hands, from behind, when Drake turned round and said, 'Mind what you are about.' Deceased then threw out both his hands against defendant's breast; his fists were clenched, but I do not know whether it was a push or a strike, and afterwards pushed him with his double fist, but do not know whether he intended to strike him or not. Drake then drew his pistol and fired. When the shot was fired, she saw the deceased put his hand on his side. Was under the impression that it was Drake that was using the bad language. She was too much excited to pay much attention to what was said. * * * Mrs. Snowball was nearer to the parties than she was. Deceased got his gun, as did young Snowball, after Drake had twice shot at the deceased."

Sam Perkins, also a witness for the defence, testified that the "deceased was a rather large man; was quick-tempered."

It is insisted on the part of the defence that the court, in its charge to the jury, failed to instruct the jury on the different degrees of homicide; that the jury, under the charge, was compelled to find the defendant guilty of murder either in the first or second degree; that the charge of the court did not fully define the law of manslaughter, to which grade of homicide the evidence was sufficient to reduce the offence; that the charge of the court directed the minds of the jury to the evidence, as established facts, that the defendant had causelessly intruded upon the premises of the deceased, and that the deceased had been killed while in defence of his own property. A careful examination of the charge of the court has satisfied us that the objections made by the defendant to the charge of the court are not well taken. The court, in its instructions to the jury, properly defined the law of murder, giving the jury the legal meaning of the terms "malice aforethought," and "express" and "implied

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malice," as used in the statute. It also defined the law of manslaughter. We make the following extracts from the charge of the court:

"Manslaughter is voluntary homicide, committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law. An assault and battery causing pain or bloodshed would be an adequate cause, and if it actually produced the sudden passion of anger, rage, resentment, or terror, under the immediate influence of which the person assaulted acts, while it does not justify nor excuse, it reduces the offence to manslaughter, if, upon the facts, otherwise the homicide would be murder." * * * Again, the court instructed the jury: "If you believe from the evidence that the defendant, without malice aforethought, or the purpose to provoke a difficulty and conflict with Snowball, went to his house to see him upon a matter of business, and hot words ensued between them, and Snowball, without justification, struck defendant a blow, causing him pain, and producing sudden passion, or anger, rage, resentment, or terror, under the immediate influence of which he shot and killed Snowball with a pistol, and that the pistol was a deadly weapon, you will find the defendant guilty of manslaughter, and assess his punishment to confinement in the penitentiary not less than two nor more than five years." "Every man has the right to defend himself against attack threatening him with serious bodily harm or death, and is presumed to be innocent until his guilt is established by the evidence to the satisfaction of the jury, beyond reasonable doubt; and unless you are so satisfied by the evidence in this cause, you will say by your verdict that you find the defendant not guilty."

The law of the case was distinctly set forth in the charge. The charge did not force the jury to any particular conclusion. On the contrary, it is not objectionable as a charge upon the weight of the evidence; nor does it intimate that

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defendant had causelessly entered upon the premises of Snowball, and killed him while in the defence of his own property. The court instructed the jury that "the defendant had a right to go peaceably to Snowball and demand the horse, and reclaim it, if he could do so without a breach of the peace, but not otherwise." The court properly instructed the jury that a man had a right to control his own home. If another comes upon his premises, and in the presence of his family uses vulgar, indecent, profane, and insulting language, he has the right to put such other person off of his premises by the use of force, such as will reasonably accomplish the purpose. The use of such force as will accomplish the purpose must be exercised and regulated by the amount of refusal and resistance. If he requires such other person to go, and he refuses, the owner of the premises has the right to reasonably increase the force until it overcomes resistance and accomplishes the purpose. The charge of the court correctly explained to the jury the rights of the owner of the premises under a certain state of facts, without intimating an opinion as to whether or not such facts were proved in the case at bar. A charge of the court which calls particular attention to the facts relied on by the parties, and indicates the law upon such facts, is proper. The principles of law were fully explained to the jury, and the jury were left free in the discharge of their duties as judges of the facts.

The court, we think, properly refused to give the instructions asked by the defendant, because they either do not state the law or are not applicable to the facts.

The first instruction asked by the defendant is as follows: "If you believe from the evidence that the defendant had cause to believe that the deceased was armed, and that his actions were such as to lead a reasonable man to believe that deceased intended to use such arms, or to kill defendant, your verdict must be an acquittal of defendant." There is

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no evidence in the case tending to show, even remotely, that the deceased was armed at the time he received the fatal shot, or that his actions were such as to induce a reasonable man to believe that he was armed, and intended to use such arms upon the defendant. The circumstances surrounding the defendant at the time of the shooting were not such as to impress his mind with a reasonable belief that Snowball was about to take his life, or do him some serious bodily harm. The proof shows that deceased was unarmed when he was killed.

The court properly overruled defendant's application for continuance. The application showed no diligence whatever on the part of the defendant to procure the attendance of the absent witness at the trial. The continuance was asked for in order to procure the testimony of James Reymond, who resides in Galveston County, Texas. The fact that Reymond had been subpoenaed as a witness in behalf of the State affords no legal excuse for the failure of the defendant to take any steps whatever to procure the testimony of said witness.

The twelfth assignment is, that "the court erred in refusing to grant a new trial because of the incapacity of H. F. Hansen to serve as a juror." One of the grounds set out in defendant's motion for new trial is, "that the defendant did not have a fair and impartial trial, in this: that one of the jurors before whom he was tried was, by reason of imperfectly understanding the English language, and for the further reason of his being of very poor hearing, incompetent and incapable as a juror, and defendant refers to exhibit A, hereto attached and made part hereof:

"Exhibit A. The State of Texas, county of Galveston: Before me, M. H. Royston, clerk of the Criminal District Court of Galveston County, personally appeared Sydney B. Swift and Robert McNeely, who, after being duly sworn, depose and say that H. F. Hansen, one of the jurors before

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whom the cause of *The State of Texas v. Dave Drake* was tried, was incompetent as a juror, because he was of imperfect hearing, and did not understand the English language; because of which he was unable to properly understand the testimony.

[Signed]

“ ROBERT MCNEELY,

“ S. B. SWIFT.”

“ The defendant in the above cause being sworn, deposes and says that the above facts were unknown to him until after the trial of said cause.

“ D. S. DRAKE.”

Exhibit A was duly attested by the officer before whom it was sworn to and subscribed.

The defendant's motion for a new trial was overruled, to which ruling of the court the defendant took a bill of exceptions. The court, before signing the bill of exceptions, added the following explanation: “ That the juror H. F. Hansen, who was originally sworn as a juror of the regular panel, was examined and tested by the court as to his ability to hear the testimony and understand the language of the witnesses, and the court was entirely satisfied as to his ability, and having been in this case submitted to the usual examination prescribed by law, no objection being made to him, he was accepted, empanelled, and sworn as a juror.” The defendant's counsel insists that the incompetency of the juror Hansen was established by the affidavits to the motion for new trial, and that defendant went to trial without any knowledge of Hansen's double infirmity.

We have already in this opinion stated the manner of organizing a jury in a capital case. The judge who presided at the trial states that this juror was submitted to the usual examination prescribed by law. If the jury were severally examined,—as, in the absence of showing in the record to the contrary, we must presume was the case,—it does seem to us almost impossible that both the court and counsel engaged

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in the cause should have failed to notice any defect of hearing, and of understanding of the English language on the part of Hansen, if any material defects of the kind really existed. We believe that the explanation of the judge who presided at the trial, made before signing the bill of exceptions, should outweigh the affidavits of the witnesses McNeely and Swift, which are attached to defendant's motion for new trial, and that the court below did not err in overruling the motion.

The verdict of the jury is abundantly supported by the law and the evidence.

It is submitted on the part of the defendant that the judgment is too severe a punishment for the crime proven. It cannot be said that the jury, after finding the defendant guilty of murder in the second degree, in assessing the punishment exceeded the limits affixed by the statute to the offence. Our Criminal Code provides that "the punishment of murder in the second degree shall be confinement in the penitentiary for not less than five years." *Pasc. Dig.*, art. 2271.

The defendant has had a fair trial, and has been ably defended, and legally convicted.

The judgment of the Criminal District Court is, therefore, affirmed.

Affirmed.

INDEX.

A.

ABATEMENT.

Death of the appellant, pending his appeal in a criminal case, abates all proceedings, though the judgment appealed from was a pecuniary fine. Note distinctions between the effect of appeals in criminal and in civil cases. In the present case the appellant's widow suggests his death, and her motion in abatement is sustained. *March v. State*, 450.

ACCOMPLICE.

The statute requires the corroboration of an accomplice to be by evidence tending to connect the accused with "the offence committed," not with the offence charged. *Tooney v. State*, 163.

ADULTERY.

1. In the trial of a man for adultery, the woman's husband is a competent witness for the State as well as the defence. *Morrill v. State*, 447.

2. Error to allow the woman's husband to testify that his wife's sister told him his wife cohabited with defendant. *Id.*

3. A single or occasional act of adulterous intercourse, without cohabitation, or a "living together in adultery," does not constitute this offence. The fact of cohabitation is for the jury. *Id.*

AFFIDAVIT.

FILE-MARK.

INFORMATIONS.

1. Objection that the affidavit for an information was filed on Sunday should be raised in the court below, and not primarily in this court. *Quære*, whether that fact would vitiate? *Stinson v. State*, 81.

2. The supporting affidavit is as indispensable as the information itself, and both must substantially charge the same offence. *Casey v. State*, 462.

AGGRAVATED ASSAULT.

ASSAULT WITH INTENT TO MURDER, 2.

1. An assault becomes aggravated when committed by an adult male upon a female; and this is sufficiently charged in an information which alleges that the accused is an "adult male, and the said E. G. being then and there a female." *Collins v. State*, 38.

2. Indictment charged that the assault was made on "the wife of T. B.," without averring that her name was unknown to the grand jurors. *Held*, a substantial defect, not cured by verdict, and available in arrest of judgment. *Ranch v. State*, 863.

3. An information for aggravated assault must charge the assault as

AGGRAVATED ASSAULT — Continued.

such, and also set out the circumstance constituting the aggravation. *Williamson v. State*, 485.

4. Information for aggravated assault with fire-arms failed to allege that "serious bodily injury was inflicted," or that the fire-arms were "deadly weapons, and used under circumstances not amounting to an intent to murder or maim," or that the assault was committed "with premeditated design, and by the use of means calculated to inflict great bodily injury." *Held*, fatally defective for want of one of these allegations. *Id.*

5. Other matter of aggravation than that alleged in the information should not be submitted by the court for the inquiry of the jury. And if a specific weapon is alleged, the proof must correspond. *McGee v. State*, 492.

ALTERATION.

If, on the face of a document offered in evidence, a material alteration is apparent, or be proved, the party claiming under the document must show that the alteration does not prejudice his rights. Erasure of the signature of one surety on a bail-bond is a material alteration. *Davis v. State*, 48.

AMENDMENT.**MINUTES OF COURT.****APPEAL.**

1. An appeal may be taken at any time during the term, and subsequent to the conviction. It is taken by giving notice thereof in open court, and having the same entered of record; and its effect is to suspend all further proceedings in the court below until it receives the judgment of this court on the appeal. *Bozier v. State*, 220.

2. In felonies, if the appeal is from the judgment, no sentence should be passed. If the appeal is taken after sentence, it supersedes the sentence. It is error to pronounce sentence on the defendant after he has appealed, and in spite of his objections. *Id.*

3. Death of the appellant abates an appeal in a criminal case. *March v. State*, 450.

ARREST.**FALSE IMPRISONMENT.**

A peace officer can arrest without warrant when a felony or a breach of the peace is committed in his presence or within his view, or when verbally ordered by a magistrate in whose presence or view such an offence is committed, or when there is no time to get a warrant, and the offender is about to escape. These are the only cases where the authority exists, except when exercised for the prevention of offences, as prescribed in the Code. *Johnson v. State*, 43.

ARREST OF JUDGMENT.

1. Objection that the indictment was not presented in open court by a quorum of the grand jury comes too late in a motion to arrest the judgment, unless previously made *in limine*. *Jinks v. State*, 68.

ARREST OF JUDGMENT—Continued.

2. A substantial defect in an indictment or information is cause in arrest of judgment, — as, for instance, that an indictment charged an assault on "the wife of T. B.," without averring that her name was unknown to the grand jurors. *Ranch v. State*, 868.

ARSON.

See a charge held unobjectionable in a trial for the wilful burning of a house. *Jones v. State*, 130.

ASSAULT WITH INTENT TO COMMIT RAPE.

Note evidence which, despite proof of *alibi*, is held sufficient to sustain a conviction for this offence. *Doyle v. State*, 442.

ASSAULT WITH INTENT TO MURDER.

1. Indictments for this offence need not allege the weapon used. *Payne v. State*, 85.

2. An arrest was attempted by an unauthorized person, and in the attempt he was cut by the accused, who was convicted of assault with intent to murder. *Held*, that the authority to arrest was a material question, and called for a charge on aggravated assault. *Johnson v. State*, 43.

3. Note a state of proof making the law of self-defence a part of the law applicable to the case, and necessary in the charge to the jury. *Edwards v. State*, 593.

4. But not necessary to charge on minor assaults, or on self-defence, unless the evidence so requires. *Winn v. State*, 621.

ATTACHMENT.

1. A witness living in the county cannot be attached until he has disobeyed a subpoena. *Tooney v. State*, 163.

2. If nothing appears to the contrary, it is presumed that attachments were founded on proper predicates. *Farrar v. State*, 489.

ATTEMPTING TO INDUCE A WITNESS TO TESTIFY FALSELY.

1. In a trial for this offence, it seems that the materiality of the solicited testimony is a question for the jury, under proper instructions. *Watson v. State*, 11.

2. Indictment charged that the accused offered \$150 to one M. if he would give certain false testimony on the hearing of a *habeas corpus* pending in behalf of one G. *Held*, that this allegation was not supported by evidence that the accused told M. that G. would pay that sum, and that the jury should have been so instructed. *Id.*

B.**BAIL.**

1. The Constitution of 1876 provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is evident." *Ex parte Foster*, 625.

2. "Proof is evident" in a capital case if the evidence would sustain a conviction of the applicant for murder in the first degree; but if the evi-

BAIL — Continued.

dence be of less efficacy, bail should be allowed him. See this case in *extenso* on the right of bail. *Id.*

BAIL-BOND.

1. Sureties on a bail-bond pleaded *non est factum*, and alleged that without their authority or knowledge, the bond, since its execution, had been materially altered by the erasure of the signature of another surety. *Held*, a sufficient answer to the *scire facias*. *Davis v. State*, 48.

2. When the State removes the accused from the custody of his bail, as by sending him to the penitentiary, the bail are relieved from their bail-bond; and, in defence to *scire facias*, they should be allowed to allege and prove such a defence. *Cooper v. State*, 215.

8. On appeal from a judgment refusing bail, it being determined by this court that the appellant was entitled to bail, and the record disclosing his ability to give bond in a certain sum, deemed reasonable, this court empowers the sheriff to take the bond, with sufficient sureties, and conditioned according to law; and directs him to file it in the District Court having cognizance of the case. *Ex parte Foster*, 625.

BILL OF EXCEPTIONS.

1. A bill of exceptions to the exclusion of evidence must set out the evidence, to enable this court to judge of its materiality. *Powell v. State*, 234.

2. When matters of fact are involved in the rulings objected to, they must be substantiated by proper bills of exceptions, or they will not be revised. Statements in a motion for new trial or the assignment of errors will not suffice. *Marshall v. State*, 278; *McDaniel v. State*, 475.

BURDEN OF PROOF.

1. If an unlawful act be clearly proved against the accused, it is for him to show justification, extenuation, or excuse, so that a reasonable doubt, at the least, may arise on the entire evidence. *Hill v. State*, 2; *Powell v. State*, 234.

2. The State has the burden of disproving a reasonable and satisfactory explanation of the possession of stolen property, given by the accused when first found with it, or when he first learned that his right to it was questioned. *Hampton v. State*, 468.

8. The burden of showing that the discretion of a minor defendant was sufficient to understand the nature and illegality of the act constituting the offence does not devolve upon the State until it is shown that the minor was under the age of thirteen. *McDaniel v. State*, 475.

BURGLARY.

1. Burglarious entry, under our statute, does not signify the entrance of the whole body, but may consist in the entrance of part of the body, with intent to commit a felony. *Burke v. State*, 74.

2. And very slight force will suffice to constitute a breaking, — as, for instance, lifting a latch, raising a window, entering at a chimney, or other unusual place. *Id.*

BURGLARY — Continued.

8. Though, under an indictment for assault with intent to commit rape, the personal presence of the female assaulted would be indispensable, it is otherwise under an indictment for burglarious entry with intent to commit rape. As the intent is the gist of this latter offence, the actual presence of the female is not requisite. *Id.*

C.**CARRYING WEAPONS.**

1. An indictment which directly charges the carrying of a pistol about the person sufficiently negatives that the accused was a traveller, as travellers can lawfully carry arms with their baggage only. *Woodward v. State*, 295.

2. Evidence that the accused held the pistol in his hand sustained the allegation that he had it about his person. *Id.*

8. That portion of the act which provides for the forfeiture of the weapon, on conviction for illegally carrying it, is unconstitutional. The County Courts have jurisdiction, concurrently with justices' courts, to try this offence. *Jennings v. State*, 298.

CASES OVERRULED.

Gherke v. The State, 13 Texas, 568, in so far as it holds non-professional witnesses to be incompetent on the issue of insanity, overruled by *Webb v. State*, 596.

CHALLENGE FOR CAUSE AND OTHERWISE.

1. Jury-service during a previous week of the pending term is not cause for challenge of a petit juror. *Garcia v. State*, 837.

2. Jurors once accepted are not challengeable peremptorily, whether the panel is full or not. *Drake v. State*, 649.

CHARGE OF THE COURT.

1. If, in a murder case, the evidence raises any doubt as to the grade of the offence, the charge should submit the question to the jury. *Hill v. State*, 2.

2. Indictment alleged that the accused offered M. \$150 to give certain false testimony, on the hearing of a *habeas corpus*, in behalf of one G. But the proof was, that the accused told M. that G. would pay him that sum to so testify. *Held*, that the jury should have been instructed that such proof did not correspond with the allegation. *Watson v. State*, 11.

8. Accused cannot complain of erroneous instructions given at his own request. *Collins v. State*, 38

4. The penalty for the offence must be charged. *Id.*

5. Instruction that "no testimony of a former alleged offence by defendant can be taken into consideration in arriving at a verdict in this case" should have been given, when relevant to the evidence and requested by the accused. *Id.*

6. An arrest was attempted by an unauthorized person, and he was cut

CHARGE OF THE COURT — Continued

by the accused, who was convicted of assault with intent to murder. *Held*, that a charge on aggravated assault should have been given. *Johnson v. State*, 43.

7. Not error to refuse special instructions when the charge given contains all that is required. *Proffit v. State*, 51.

8. Instruction that "the credibility of witnesses and weight of testimony are committed entirely to the jury, and by their conclusions thereon, under the law given them by the court in charge, they should determine their verdict," did not authorize the jury to convict on the mere preponderance of evidence, and enunciated no more than the language of the Code. *Webb v. State*, 65.

9. In trials for keeping a disorderly house, it is advisable, though not necessary, that the word "prostitution" be explained in the charge. *Bigby v. State*, 101.

10. See a charge held proper in a trial for the wilful burning of a house. *Jones v. State*, 130.

11. Not error to refuse instructions already given in substance. If, however, it is doubtful whether requested instructions are proper, it is advisable to give them. *Henderson v. State*, 134.

12. The signature of the judge sufficiently certifies the charge. *Id.*; *Roberts v. State*, 141.

13. Instructions on manslaughter ought not to be given when the proof clearly makes a case of murder, in either degree. *Id.*

14. Note a state of proof in a murder case which only required instructions on the two degrees of murder, and on malice. *Id.*

15. In misdemeanors, the court, with consent of the parties, may give its charge verbally; and if the record shows no charge, this court presumes that a correct verbal charge was so given, or else that no charge was given. *Carr v. State*, 153.

16. But if written charges were given or refused, they must be authenticated by the signature of the judge. *Id.*

17. Note in this case the collocation of the provisions of the Code on offences committed by poison, and their respective bearings on instructions to the jury. *Tooney v. State*, 163.

18. Indictment for murder by poison did not allege an attempt to rob. *Held*, error to instruct the jury to consider whether such was the intent. The charge of the court must meet and be limited by the case made by the indictment. *Id.*

19. Error to so instruct as to allow a conviction, if the jury found that the offence was committed after the filing of the indictment. *Shoefercater v. State*, 207.

20. In a trial for theft of animals, the defence being a purchase of them from one not the owner, the court instructed for acquittal if the purchase was in good faith, with or without a bill of sale, but for conviction if it was a device to cover a fraudulent taking. *Held*, a proper question for the jury, and fairly submitted. *Id.*

21. A conviction will not be reversed because the court below charged

CHARGE OF THE COURT—Continued.

on a less degree of offence than the evidence sufficed to establish; nor because the jury convicted for such less degree. *Powell v. State*, 284.

22. To instruct for conviction if the accused, at any time after the passage of the act of 1876 "to regulate the practice of medicine," practised medicine without complying with its requirements, was error, inasmuch as that act did not take effect from its passage, but ninety days after the adjournment of the Legislature. *Logan v. State*, 303.

23. If the facts in a murder case raise a doubt whether the jury might convict of manslaughter or find justification, the charge should give appropriate instructions thereupon, enabling the jury to pass upon the doubt. *Robles v. State*, 846.

24. The charge in a felony case should be filed as soon as it has been read, and before it is handed to the jury. Without a file-mark it will not be recognized on appeal, and a reversal ensues. *Richarte v. State*, 359.

25. Not correct to instruct that "express malice is where one, with a deliberate intent, kills another with an instrument likely to produce death." *Summers v. State*, 365.

26. Doubts as to the propriety of giving a requested instruction should be solved in favor of the accused. *Id.*

27. A charge on any apparent issue is not appropriate unless some evidence pertinent to the issue has been adduced. *Shultz v. State*, 390.

28. In murder cases the charge must expound malice; and if the conviction be for the first degree, the distinction between express and implied malice must appear in the charge. *Jones v. State*, 397.

29. Note in this case a sufficient charge on the presumption of innocence, reasonable doubt, burden of proof, and requisite cogency of circumstantial evidence. *Templeton v. State*, 398.

30. In misdemeanor trials no charge need be given, unless requested; but requested instructions, whether given, modified, or refused, must be in writing, unless the parties consent it may be done verbally. Disregard of these rules, if excepted to at the time, is error. *Jordan v. State*, 422; *Trippett v. State*, 595; *Williams v. State*, 615.

31. In a trial for theft of a "yearling," the charge designated the animal "the calf described in the indictment." Held, an immaterial discrepancy. *Trafton v. State*, 480.

32. In a trial for aggravated assault, the charge should not submit to the jury any other matter of aggravation, or a different weapon, than that alleged in the information. *McGee v. State*, 492.

33. In felony cases the law must be given in charge to the jury, whether asked or not. *Robinson v. State*, 519.

34. Note a conflict of evidence which necessitated, as part of the law applicable to the case, and though not requested, an explicit charge of the reasonable doubt in respect of the ownership of the stolen property. *Id.*

35. In a case of theft, the defence being that the accused was an employee, and acted under his employer's orders, a charge was correct which hinged the verdict on the question of guilty knowledge. *Taylor v. State*, 529.

CHARGE OF THE COURT—*Continued.*

86. If the offence admits of degrees, and there be evidence tending to show a lower degree than that charged, the difference between the degrees must be explained to the jury. *Gatlin v. State*, 581.

87. *Per contra*, if the evidence shows one of the higher grades, no instruction on the lesser grades is required. *Id.*

88. If the facts cannot mitigate the offence charged to a less grade, on which instructions are asked by the accused, they should not be given. *Id.*

89. See a correct instruction respecting deductions from the means or instrument by which homicide was committed. *Id.*

40. Error to refuse a proper instruction on the presumption of innocence, when none was given in the general charge. *Coffee v. State*, 545; *McMullen v. State*, 577.

41. The court need not give requested instructions which are substantially embodied in its general charge, nor instruct on non-existent proof; but if the aspect of the case be doubtful in this respect, it is better to give a requested charge, if abstractly correct. *Pocket v. State*, 552.

42. Note the application of the reasonable doubt in a trial for murder, alleged to have been committed by shooting, striking, and burning. *Gonzales v. State*, 584.

43. When the proof raised a question of self-defence, the law thereon should have been given in charge. *Edwards v. State*, 593.

44. In a trial for assault with intent to murder, no charge on the law of minor assaults or on self-defence need be given, unless required by the evidence as part of the "law applicable to the case." *Winn v. State*, 621.

45. Note, in a trial for murder, instructions on manslaughter and self-defence held correct. *Drake v. State*, 649.

CLERICAL ERROR.

PLEADING.

TRANSCRIPT, 4.

COMMON LAW.

The common-law rules of evidence in criminal cases have been changed by the Code of this State only so far as they conflict with its provisions. *Morrill v. State*, 447.

CONFESSIONS.

1. When a confession of the main fact would not be admissible, evidence should not be admitted of collateral facts tending to prove the main fact. For instance: evidence that the accused, while in custody and uncautioned, sent word to a witness to leave the country, and promised to pay his expenses, was not competent. *Marshall v. State*, 273.

2. Note a state of case in which it was correct to admit in evidence against the defendants on trial a confession of a joint offender not on trial, made while in arrest. *Zumwalt v. State*, 521.

3. A confession may serve, not only as proof of the *corpus delicti*, but also as evidence of the *animus* of the act. *Pocket v. State*, 552.

4. Confessions of a defendant in arrest, made after he was warned that

CONFESSIONS — Continued.

his statements might be used against him, are competent evidence for the State. *Id.*

CONSTITUTIONAL LAW.**JURISDICTION.**

1. The provisions of the State Constitution respecting the titles of legislative acts are mandatory, but a liberal construction obtains. *Ex parte Mabry*, 93.

2. The title of the "dog-tax law" of 1876 expresses but one subject, and the provisions of its third section are subsidiary thereto. *Id.*

3. The constitutionality of an act of a State legislature is to be tested by the limitations imposed on the legislative powers by the Constitution. But acts of Congress are tested by the grants of power conferred by the Federal Constitution. *Id.*; *Logan v. State*, 306.

4. The act of August 21, 1876, authorizing the dismissal of appeals when the appellant has escaped, is constitutional. *Brown v. State*, 126.

5. That part of article 6512, Paschal's Digest, which enjoins forfeiture of a weapon on a conviction for illegally carrying it, is unconstitutional; and the *maximum* legal penalty being less than \$200, the County Courts have concurrent jurisdiction with justices of the peace to try charges for this offence. *Jennings v. State*, 298.

6. The Constitution of 1876, and the legislation thereunder, do not invest justices of the peace with any exclusive criminal jurisdiction. The County Courts have concurrent jurisdiction with justices in misdemeanors wherein the *maximum* fine does not exceed \$200. *Solon v. State*, 301.

7. The provisions of the act of 1876, "to regulate the practice of medicine," which authorize district judges to appoint boards of medical examiners, are within the authority expressly conferred on the Legislature by the Constitution of 1876. Without such express authority, however, these and the other provisions of the said act could stand on the general police power. *Logan v. State*, 306.

8. "Proof is evident," in the meaning of the Bill of Rights, if the evidence adduced on an application for bail would sustain a verdict convicting the applicant of murder in the first degree; but if the evidence be of less efficacy, bail should be allowed. *Ex parte Foster*, 625.

CONSTRUCTION OF STATUTES.**JURISDICTION, 8.****CONTINUANCE.**

1. Compliance with the statutory requirements entitles the accused to a first continuance as a matter of right. *Stephenson v. State*, 79; *Farrar v. State*, 489.

2. The court below refused a first continuance in a felony case on the ground that neither diligence nor materiality was shown. But the State's evidence being mainly circumstantial, and this court deeming diligence shown, and that the proof might have influenced the verdict, *held* that the defendant is entitled to a new trial because of the refusal of the continuance. *Cox v. State*, 118.

CONTINUANCE — Continued.

3. A second application must show that the absent testimony can be procured from no other source. *Henderson v. State*, 134.

4. Mere affirmation of diligence is not sufficient; the date, disposition, and return of the process must be stated. *Id.*

5. The refusal of a continuance will not be revised unless it was excepted to at the time, and a bill of exceptions was duly saved. *Blankenship v. State*, 218.

6. Note a state of case in which it would have been proper to grant a continuance, to enable the accused to obtain testimony cumulative of evidence adduced by him at the trial. *Bozier v. State*, 220.

7. Process for witnesses must be sued out in good time, and the application for a continuance must disclose to whom and when delivered. No presumptions aid the application. *Robles v. State*, 346.

8. Applications for a first continuance must allege that it is not sought for delay. *Zumwalt v. State*, 521.

9. Applications not based on the statute, nor complying with its requirements, are addressed to the discretion of the court below, and its refusal will not be revised unless abuse of that discretion be apparent. *Id.*

10. Attachments were sued out over two months before the application for a continuance; the return was "not executed," but without date. *Held*, that diligence is not shown. *Townsend v. State*, 574.

11. The unexpected attendance of a State's witness is not a surprise entitling the accused to a continuance, no deception having been practised on him. *Id.*

12. In a trial for murder, wherein the defence was insanity, it was error to refuse a continuance on the ground that the absent witnesses were not experts. *Webb v. State*, 596.

13. That the continuance is not sought for delay must be alleged in a first, as well as subsequent applications. *Peck v. State*, 611.

14. As to showing of diligence in a third application. *Id.*

15. Application must not only show a timely procurement of process for the absent witness, but also a timely delivery of it to a proper officer. Better to make the process and its return a part of the application. *Fields v. State*, 616.

16. That the State had summoned an absent witness desired by the defence did not excuse or dispense with diligence on the part of the accused. *Drake v. State*, 649.

COUNTY COURTS.

1. The County Courts of this State have concurrent jurisdiction with justices' courts to try misdemeanor cases in which the penalty does not exceed \$200. *Woodward v. State*, 295; *Jennings v. State*, 298; *Solon v. State*, 301.

2. As the Court of Appeals has no appellate jurisdiction over a judgment of a County Court rendered on appeal from a fine of less than \$100, imposed by a justice of the peace, it is not clear that it can, by *mandamus*, supervise even ministerial action of a County Court in such a case. If the action is not ministerial, but judicial, such power does not exist. *Wyatt v. Barmore*, 332.

D.

DISORDERLY HOUSE.

1. The owner of a house commits no offence against the laws of this State by leasing it, with knowledge that it is to be kept as a house of public prostitution. *Aliter* at common law. *Albertson v. State*, 89.

2. In trials for keeping a disorderly house, it is advisable, but not necessary, that the word "prostitution" be explained in the charge to the jury. *Bigby v. State*, 101.

DISTURBING RELIGIOUS WORSHIP.

1. Indictment charges that the accused, "heretofore, to wit, on the 1st day of December, A. D. 1876, in the County of H., and State of T., did wilfully disturb a congregation assembled for religious worship, and conducting themselves in a lawful manner, by loud and vociferous talking," etc. *Held*, a sufficient allegation of the time, place, and manner of the offence. *Bush v. State*, 64.

2. The proof must show that at the time of the alleged disturbance a congregation was assembled for religious worship, and was wilfully disturbed by the defendant in one of the ways set out in the statute. *Richardson v. State*, 470.

3. A minister being accused of misconduct, the church officials resolved to silence him until superior authority took action on his case, and one of them, at the instance of the others, so notified him in the presence of the congregation. *Held*, not a wilful disturbance, nor within the spirit of the law or the mischief to be suppressed. *Id.*

DOG-TAX.

The title of the "dog-tax law" of 1876 expresses but one subject, and the provisions of its third section are subsidiary thereto. *Ex parte Mabry*, 93.

DRUNKENNESS.

Voluntary intoxication is no defence for crime. *Payne v. State*, 85.

DYING DECLARATIONS.

1. Dying declarations, made under the restrictions of the statute, and stating the circumstances under which the declarant received the mortal injury, are evidence in a prosecution for killing the declarant. *Roberts v. State*, 141.

2. But the statements must be such as would be competent if elicited from a living witness, and not be mere matter of opinion. *Id.*

3. "S. R. killed me for nothing" is the statement of a fact, and competent in a dying declaration. *Id.*

4. The substance of the declaration may be proved, if the witness cannot state it literally. *Id.*

E.

ESCAPE.

PRACTICE IN COURT OF APPEALS, 9, 10.

Defendant's appeal from the judgment of conviction was dismissed on

ESCAPE — Continued.

account of his escape; and, being subsequently apprehended, he was sentenced in the court below, and now appeals from the sentence. The attorney-general moves to dismiss the appeal. *Held*, that the jurisdiction of this court over the case was ousted by the escape, and the motion to dismiss is sustained. *Brown v. State*, 546.

ESTRAYS.

A person who, in conformity with the estray laws, has taken up and holds an estray, has a special property in the animal, and an indictment for its theft may allege him to be the owner. *Jinks v. State*, 68.

EVIDENCE.**ACCOMPLICE.****BURDEN OF PROOF.****CONFESSIONS.****DYING DECLARATIONS.****FACT CASES.****VARIANCE.****WITNESS.**

1. The jury should reconcile all conflict of testimony, if possible; and if not, should credit such as in their opinion is best entitled to belief. *Taylor v. State*, 1.

2. Evidence that the accused told M. that G. would pay him a certain sum to give certain false testimony, did not support an allegation that the accused himself offered to pay M. the money. *Watson v. State*, 11.

3. Though descriptive averments be unnecessarily particular, they must be proved as made. *Id.*

4. A party claiming under an altered document must account for material alterations, — as, for instance, the erasure of the signature of one surety on a bail-bond. *Davis v. State*, 48.

5. In a trial for false imprisonment, the prosecution need only prove the imprisonment. It is for the defence to prove that it was lawful. *Kirbie v. State*, 60.

6. The allegation of ownership is sustained by proof which shows that the alleged owner held the stolen animal as an estray, in conformity with the estray laws. *Jinks v. State*, 68.

7. The jury are the judges of the facts and of the weight of the evidence, and the exclusive judges thereof, except where the law itself has otherwise provided. *Jones v. State*, 86.

8. To sustain a conviction, the evidence must not only establish the *corpus delicti*, but must inculcate the accused to a certainty, beyond strong probability or suspicion. *Barnell v. State*, 113.

9. The best existing evidence should be produced or accounted for. *Id.*

10. Proof of the venue must appear in the record, or the conviction will be set aside. *Yarborough v. State*, 125; *Boston v. State*, 383.

11. The allowance of a leading question is not error unless the defendant was prejudiced thereby, and it must be shown that it was not allowed under the exceptions to the general rule. *Henderson v. State*, 134.

EVIDENCE — Continued.

12. Evidence of the violent character of the deceased is not competent, unless the accused was in danger of bodily harm at the time of the killing. *Roberts v. State*, 141.

18. The statute requires the corroboration of an accomplice to be by evidence tending to connect the accused with "the offence committed," not with the offence charged. *Tooney v. State*, 168.

14. In a murder case, the accused proposed to show the *animus* of the prosecuting witness, a brother of the deceased, by evidence that, after the homicide, he was apprised of defendant's place of residence in another State, and of his desire, but pecuniary inability to return and stand his trial; and further, by evidence that defendant's place of residence in another State was generally known in the county of the *forum* for several years before he was there arrested and brought back by extradition process, which was not procured for his arrest until his main witnesses had died. *Held*, that this evidence was correctly excluded on the ground of irrelevancy and immateriality. *Carlson v. State*, 194.

15. In a trial for swindling, by purchasing goods on another's credit, the accused offered to prove that they were bought for the family of the person whose credit was used, and were delivered to the latter's wife; but the proof was disallowed because nothing done after the purchase could be a defence. But *held*, that it was germane to the question of authority, and should have been admitted. *Bozier v. State*, 220.

16. In a trial for the murder of a school-master in his school-house, the accused proposed to prove his own declarations of his purpose in going there, expressed *en route*. *Held*, not *res gestæ*, nor competent evidence for the accused. *Powell v. State*, 284.

17. Evidence must correspond with the allegations, and be confined to the issue. *Fore v. State*, 251.

18. In a trial for theft, it was error to admit proof that the accused had been extradited from Mexico on a charge of assault with intent to murder. *Id.*

19. See this case for the requisites of circumstantial evidence. *Rodriguez v. State*, 256.

20. The rules of evidence exclude such as implies that better exists, but which is not adduced or accounted for. The greatest procurable amount of evidence, however, is not demanded. *Id.*

21. Evidence, though not directly bearing on the issue, nor sufficient *per se* to warrant a conviction, is relevant if it tends to prove the issue, or constitutes a link in the proof of it. *Marshall v. State*, 278.

22. The relevancy of evidence need not be intrinsically apparent when offered, if the counsel offering it undertakes to connect it with the issue by other proof. But prosecuting counsel should be cautious in offering such evidence, especially in capital cases. *Id.*

28. When a confession of the main fact in issue would not be admissible, a confession of collateral facts tending to establish the main fact should not be admitted. For instance: it was not competent to prove that the accused, while in custody, and uncautioned, sent word to a witness to leave the country, and promising to pay his expenses. *Id.*

EVIDENCE — Continued.

24. Not proper to ask an impeaching witness whether, from the reputation he gives the impugned witness, he would believe the latter. Note in this case the proper interrogations. *Id.*

25. Evidence that accused held a pistol in his hand sustains the allegation that he had it about his person. *Woodward v. State*, 295.

26. In a trial for illegally practising medicine, the accused may prove that he comes within the *provisos* of the act of 1876 "to regulate the practice of medicine." *Logan v. State*, 306; *Smith v. State*, 318.

27. Opinions of non-professional witnesses respecting the sanity or insanity of the accused, and the facts on which they are founded, are competent evidence in this State. *McClackey v. State*, 320; *Webb v. State*, 596.

28. Conflicts of testimony are for the solution of the jury. *Brady v. State*, 337.

29. Express malice is never inferred from the homicidal act or the weapon used, but must be proved. *Richarte v. State*, 359.

30. A surgeon or physician, though not compensated for his *post-mortem* examination, may be required to disclose its result, but cannot be compelled to make one. *Summers v. State*, 365.

31. Not material error to exclude evidence of a fact too remotely pertinent to merit appreciable weight. *Shultz v. State*, 390.

32. For requisites of newly discovered evidence as cause for new trial, see *Templeton v. State*, 398.

33. Note evidence held sufficient, though conflicting, to support a conviction for murder in the second degree. *Id.*

34. And evidence which, despite proof of *alibi*, is sufficient to sustain a conviction for assault with intent to commit rape. *Doyle v. State*, 442.

35. In a trial for adultery, it was error to allow the woman's husband to testify, for the State, that his wife's sister informed him his wife cohabited with defendant. *Morrill v. State*, 447.

36. The common-law rules of evidence in criminal cases have been changed by our Code only so far they conflict with its provisions. *Id.*

37. Defendant's explanation of his possession of stolen property, given when he is first found with it, or first knows his right is questioned, is evidence for him; and, if satisfactory, the State must disprove it. But his declarations prior to any adverse claim, or to any suspicion cast upon his right, are not evidence for him. *Hampton v. State*, 463.

38. Unnecessary descriptive averments must be proved. *Id.*

39. Proof necessary to warrant a conviction for wilfully disturbing religious worship. *Richardson v. State*, 470.

40. The proof must sustain the allegations of the indictment, or a conviction will not stand. *Robinson v. State*, 519.

41. Note a confession of a joint offender, not on trial, and made in arrest, properly admitted in evidence against the defendants on trial. *Zumwalt v. State*, 521.

42. When a conspiracy is shown, the declarations of one of the conspirators in furtherance of the common design, as long as the conspiracy continues, are evidence against the others, though made in their absence.

EVIDENCE — Continued.

The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all. *Hannon v. State*, 549.

43. See in this case the scope of inquiry allowable when the defence is insanity. *Webb v. State*, 596.

44. *Gherke v. The State*, 13 Texas, 568, overruled in so far as it holds non-professional witnesses incompetent to prove insanity. *Id.*

45. And the ordinary rule as to cumulative evidence does not obtain on this issue. *Id.*

46. In a trial for murder, proof of a difficulty several hours before the killing cannot constitute justification. *Peck v. State*, 611.

47. Nor previous threats, unless the deceased, when killed, manifested a purpose of executing them. *Id.*

48. Not error, in a trial for murder, to exclude evidence offered by the defence to prove threats of the deceased against the brother of accused. *Drake v. State*, 649.

F.**FACT CASES.**

1. Evidence held sufficient to sustain a conviction for murder in the second degree. *Hill v. State*, 2; *Proffit v. State*, 51.

2. Circumstantial evidence held insufficient to sustain a conviction for murder in the second degree. *Rodriguez v. State*, 256.

3. Evidence held sufficient, though conflicting, to sustain a conviction for murder in the second degree. *Templeton v. State*, 398.

4. Facts adequate, despite proof of *alibi*, to sustain a conviction for assault with intent to commit rape. *Doyle v. State*, 442.

5. Facts not sufficient to warrant a conviction for wilfully disturbing religious worship. *Richardson v. State*, 470.

6. Facts not sufficient to sustain a conviction for murder in the first degree. *Cox v. State*, 493.

FALSE IMPRISONMENT.**ARREST.**

1. The State makes a *prima facie* case by proving the imprisonment, for that is presumed unlawful until the contrary is shown. It is for the defence to prove that it was lawful. *Kirbie v. State*, 60.

2. A *posse comitatus* are protected by the warrant of the officer who summoned them, though it was not in their possession when they made the arrest; and the guilt or innocence of the arrested party is not a material inquiry in their trial for his false imprisonment. *Id.*

3. A volunteer, however, must look to his right to interfere, and acts at his peril. *Id.*

FILE-MARKS.

1. An information and its supporting affidavit being attached to each other, the file-mark on the former suffices for both. *Stinson v. State*, 31.

2. Unless the transcript shows that the charge to the jury in a felony case was filed, the paper stands unauthenticated, and the conviction will

FILE-MARKS — Continued.

be set aside. The charge should be filed as soon as read, and before it passes to the jury. *Richarte v. State*, 359.

FORMER CONVICTION.

A conviction for simple assault, adjudged by a justice of the peace at the instance of the culprit, and without warrant or evidence, constitutes no bar or defence to a subsequent prosecution for aggravated assault. *Watson v. State*, 271.

H.**HABEAS CORPUS.**

1. The judge of the Criminal District Court of Harris County issued a writ of *habeas corpus*, but, under stress of his official duties, transferred the matter to a district judge. On trial of the present defendant for subornation of perjury at the hearing of the *habeas corpus*, the State offered the order of transfer as evidence, and defendant objected that it was irrelevant and illegal. But *held*, that the order was competent to prove that the *habeas corpus* was pending when the offence was committed, and the transfer itself was not unlawful. *Watson v. State*, 11.

2. The writ of *habeas corpus* is not available to effect the purposes of an appeal, *certiorari*, or *supersedeas*. *Ex parte Mabry*, 93; *Griffin v. State*, 457.

3. In *habeas corpus* cases this court habitually refrains from commenting on the evidence. *Ex parte Moore*, 103.

4. In such cases this court accords great consideration to the construction placed by the court *a quo* upon conflicting testimony. *Id.*

5. In a *habeas corpus* case this court will not, with a view to discharging the applicant, consider evidence of a former acquittal. *Griffin v. State*, 457.

6. In *habeas corpus* cases this court forbears comment on the evidence. *Ex parte McKinney*, 500.

7. Neither the sufficiency nor validity of an indictment, nor the constitutionality of the statute on which it is founded, can be tested by writ of *habeas corpus*. Otherwise, it seems, before indictment found. *Parker v. State*, 579.

8. After indictment found, the courts cannot, on *habeas corpus*, discharge the accused without bail. *Id.*

9. Application for a second writ of *habeas corpus* must show that, since the hearing on the first writ, the applicant has obtained important evidence not obtainable at the former hearing, and must set out the evidence; and, if it be that of a witness, his affidavit must be filed. *Ex parte Foster*, 625.

10. The right to a second writ is conferred in two classes of cases. 1. Where the applicant has obtained important evidence, which, though not newly discovered, was out of his power to produce at the former hearing. 2. Where the evidence is newly discovered. *Id.*

11. Applications for a second writ, if based on testimony of a witness, must show why the testimony was not available at the former trial, and

HABEAS CORPUS — Continued.

exonerate the applicant from lack of diligence. If the testimony be newly discovered, the application must conform to all the requirements of an application for a new trial based upon such testimony. *Id.*

12. No appeal lies from the refusal of a writ of *habeas corpus*. *Id.*

13. When a writ was granted and bail refused below, this court, on appeal, will not affirm the judgment on the ground that the writ should not have been granted. It will look to the proofs in the record, and enter its judgment in view thereof, but will not revise the rulings below on incidental questions. *Id.*

14. See this case as to the legal signification of the constitutional phrase, "proof is evident," and its bearing in applications for bail. *Id.*

HEARSAY EVIDENCE.**ADULTERY.****I.****ILLEGAL PRACTICE OF MEDICINE.**

1. The *provisos* to the act of 1876, "to regulate the practice of medicine," are not exceptions to the enacting clause, and need not be negatived in an information based on that enactment. *Blasdell v. State*, 268; *Logan v. State*, 306.

2. The act of August 21, 1876, "to regulate the practice of medicine," did not take effect till ninety days after that date. Wherefore it was error to instruct the jury for conviction if they found that the accused, without complying with its requirements, had practised medicine at any time after its passage. *Id.*

3. The provisions of said act are in conformity with express authority conferred by the Constitution on the Legislature; but, irrespective of such express authority, the enactment would stand on the general police power of the Legislature. *Id.*

4. In a trial under said act, the accused may prove his exemption under the *provisos*, and it was error to overrule an application for new trial based on the exclusion of such evidence. *Smith v. State*, 318.

INDICTMENT.**INFORMATIONS.****LOCAL-OPTION LAW.****PLEADING.**

1. Indictments for perjury must allege (1) the judicial proceeding or due course of justice wherein the oath was taken; (2) the lawful taking of the oath; (3) the testimony given; (4) its materiality; and (5) its wilful falsehood. *Watson v. State*, 11.

2. Bad spelling, bad grammar, or other verbal inaccuracies, if they do not affect the sense of the indictment or information, do not vitiate it. *Stinson v. State*, 31.

3. Indictments for assault with intent to murder need not allege the weapon used. *Payne v. State*, 85.

4. See indictment for disturbing religious worship held to be sufficient, though ill-constructed in one respect. *Bush v. State*, 64.

INDICTMENT — *Continued.*

5. Objection that the indictment was not duly presented in open court must be taken *in limine*. *Jinks v. State*, 68; *Templeton v. State*, 398.

6. If one person has the general and another a special property in the thing stolen, the indictment may charge the ownership in either. One who, complying with the estray laws, holds an estray, has a special property in the animal. *Id.*

7. Surplusage may be eliminated from an indictment in determining its sufficiency. Note this case as an instance. *Burke v. State*, 74.

8. Indictment for burglary with intent to commit rape held sufficient, eliminating meaningless phraseology. *Id.*

9. Indictment for perjury need not recite the substance of the oath taken by the accused; it suffices to allege that he was duly sworn. But if the oath be set out, or the manner of taking it be needlessly described, the proof must correspond. *Massie v. State*, 81.

10. Indictment for perjury must allege that the false testimony was material to the issue, or its materiality must appear on the face of the indictment. *Id.*

11. If otherwise sufficient, it need not charge that the accused "committed perjury," *in hæc verba*. *Id.*

12. It is sufficient if an indictment pursues the language of the statute, provided the act constituting the offence be fully and expressly alleged, without uncertainty or ambiguity. *Bigby v. State*, 101.

13. If coin be the thing stolen, its kind should be alleged in the indictment, if known to the grand jury; and if not known, that fact should be alleged. *Williams v. State*, 116.

14. "Fifty silver half-dollar pieces, of the value of fifty cents each," is not a sufficient description of coin alleged to have been stolen. *Id.*

15. Objection that no copy of the indictment had been served on the accused comes too late after verdict. *Roberts v. State*, 141.

16. If one person has the general and another a special property in a chattel, an indictment for its theft may allege the ownership in either. *Fore v. State*, 251; *Trafton v. State*, 480.

17. Indictment for murder by shooting alleged that the "leadens balls were shot off," instead of the pistol. *Held*, that this was no substantial objection. *McClackey v. State*, 320.

18. If the indictment, as it appears in the transcript, lays the time of the offence at a date subsequent to the filing of the indictment, a reversal must ensue, however probable that the date is merely a clerical error in making out the transcript. *Robles v. State*, 846.

19. To the rule that the assaulted party must be named in the indictment, the only exception is when the name is unknown to the grand jurors; and that fact must be averred. *Ranch v. State*, 363.

20. Indictment charged an assault on "the wife of T. B.," without averring that her name was unknown. *Held*, not cured by verdict, and the motion in arrest of judgment should have been sustained. *Id.*

21. See indictment for murder sustained. *Carter v. State*, 458.

22. Unnecessary descriptive averments do not vitiate an indictment, but must be proved. *Hampton v. State*, 468.

INDICTMENT — Continued.

23. Indictment for theft of property belonging to a minor charged that it was taken from the possession of "Mrs. J. H., the natural guardian" of the minor. *Held*, a good allegation of the possession. *Trafton v. State*, 480.

24. Indictment for theft of property belonging to a widow and her children under her control may allege the ownership in the widow. *Crockett v. State*, 526.

25. Printed forms of indictments may be used, and unnecessary written captions do not vitiate. *Winn v. State*, 621.

INFORMATIONS.**INDICTMENT.****PLEADING.**

1. An information must, in all material allegations, follow the affidavit. But neither bad spelling nor verbal or grammatical inaccuracies, which do not affect the sense, are fatal to an information or indictment. *Stinson v. State*, 31.

2. An affidavit attached to an information which bears the file-mark of the clerk will itself be considered filed. *Id.*

3. The commission of the offence must be alleged at a time anterior to the filing of the information, but not so remote as to show that the prosecution is barred by limitation. *Collins v. State*, 37; *Brewer v. State*, 248.

4. The affidavit and the information must agree as to the time of the commission of the offence. *Id.*; *Williamson v. State*, 485.

5. An information for aggravated assault by an adult male upon a female sufficiently charges the aggravation by alleging that the accused was an "adult male, and the said E. G. being then and there a female." *Collins v. State*, 38.

6. Informations for illegally practising medicine need not negative the *provisos* of the act of 1876. *Blasdell v. State*, 263.

7. Informations for unlawfully herding stock on another's land must allege the number of hours the herding was continued, as the penalty is regulated thereby. *Linney v. State*, 344.

8. An affidavit is as indispensable as the information itself, and both must substantially charge the same offence. *Casey v. State*, 462.

9. For requisites of informations for aggravated assault, see *Williamson v. State*, 485.

INSANITY.

1. The opinions of non-professional witnesses respecting the sanity or insanity of the accused, and the facts on which they are founded, are evidence in this State. *McClackey v. State*, 320; *Webb v. State*, 596.

2. Sanity is presumed, until the contrary is shown. *Id.*

3. To absolve from crime, a greater degree of insanity must be shown than would invalidate a contract. *Id.*

4. Note a proper charge to the jury in a trial for murder, in which the defence was insanity. *Id.*

INSANITY — Continued.

5. And note the scope allowed in eliciting evidence on this question, both as to time and topics. Insanity proved at a particular period is presumed to have continued until disproved, unless it was of a casual character; but this presumption is one of fact, rather than law. *Id.*

6. On this question the number of witnesses may be material, and the ordinary rule respecting cumulative evidence does not obtain. Note the ruling on the continuance asked in this case. *Id.*

7. *Gherke v. The State*, 18 Texas, 568, overruled in so far as it holds non-professional witnesses incompetent on this question. *Id.*

INTENT.

1. Every one is presumed to understand the probable result of his acts; and when an unlawful act is clearly proved against the defendant, it is for him to show justification, mitigation, or excuse, or at least to raise a reasonable doubt of his guilt. *Hill v. State*, 2.

2. The intent is the gist of a burglarious entry with intent to commit rape, and therefore the actual presence of the female is not requisite, as it would be in an assault with like intent. *Burke v. State*, 74.

3. Neither at common law nor under the Code of this State need the intent necessary to constitute murder be an intent to take life. It may suffice if it was to inflict serious bodily injury. *Summers v. State*, 365.

4. See a correct instruction in a murder case, as to the intent deducible from the means or instruments wherewith the killing was done. *Gatlin v. State*, 581.

J.**JEOPARDY.**

FORMER CONVICTION.

JUDICIAL KNOWLEDGE.

1. It is judicially known that there is a Criminal District Court for Galveston and Harris Counties, and who the judge thereof is. *Watson v. State*, 11.

2. Judicial knowledge does not take cognizance whether a particular locality is within a certain county. It does, however, of the extent of governmental jurisdiction, and of political subdivisions and their relative positions; though not of their precise boundaries, otherwise than as defined by public statutes. *Boston v. State*, 383.

JURISDICTION.

1. The escape of an appellant pending his appeal divests the jurisdiction of this court; and when that fact is made to appear, and the case is dismissed, it cannot be reinstated on account of the voluntary return of the appellant. *Brown v. State*, 126.

2. The County Courts have concurrent jurisdiction with justices' courts to try misdemeanor cases in which the penalty does not exceed a fine of \$200. *Woodward v. State*, 295; *Jennings v. State*, 298; *Solon v. State*, 801.

3. Courts cannot transcend the authority conferred on them by the law

JURISDICTION — Continued.

of their creation, nor enlarge their jurisdiction by intendment, so as to embrace objects not expressed in that law. *Solon v. State*, 801.

4. This court has no jurisdiction over a judgment of a County Court rendered on appeal from a fine of less than \$100, imposed by a justice of the peace; and, therefore, it is not clear that it has jurisdiction by *mandamus* to supervise even ministerial action of a County Court in such a case. If the action was not ministerial, but judicial, this court has not such supervisory power. *Wyatt v. Barmore*, 882.

5. Defendant's appeal from the judgment of conviction was dismissed on account of his escape; and, being subsequently apprehended, he was sentenced in the court below, and now appeals from the sentence. The attorney-general moves to dismiss the appeal. *Held*, that the jurisdiction of this court over the case was ousted by the escape, and the motion to dismiss is sustained. *Brown v. State*, 546.

JURORS AND JURY.**OATH TO JURY.****SPECIAL VENIRE.**

1. The jury-law of 1876 prescribes no means of completing the panel after a special *venire* and the jury-box have been exhausted, but does not repeal the previous law on that subject. The panel may be filled by talesmen, summoned under the verbal order of the court. *Roberts v. State*, 141.

2. Section 22 of the jury-law makes it cause for challenge that a petit juror had "served for one week in the District Court within six months preceding." *Held*, that the word *preceding* has reference to a prior term of the court, and that a previous week's jury-service during the pending term is not cause for challenge. *Garcia v. State*, 887.

3. Petit jurors summoned in a capital case cannot be excused by the court in advance of the trial. *Robles v. State*, 846.

4. Jurors summoned on a special *venire* should be called and tested in the order their names appear thereon. *Id.*; *Drake v. State*, 649.

5. One who "rents a room and boards" is a competent juror, being a householder in the meaning of the statute. *Robles v. State*, 846.

6. A jury are the exclusive judges of the facts in every criminal case, but in no case of the law. They must be governed by the law given in charge by the court. *Johnson v. State*, 428.

7. A conviction will be set aside when the record shows that the jury were summoned by a sheriff not sworn as prescribed in section 12 of the jury-law of 1876. *Hicks v. State*, 488.

8. Not necessary that the accused or his counsel shall be present at the drawing of a special *venire*. *Pocket v. State*, 552.

9. In the organization of juries in capital cases, section 22 of the jury-law of 1876 does not apply. *Drake v. State*, 649.

10. After a juror has been accepted, he is not subject to peremptory challenge. But the court, it seems, may have discretionary powers to excuse an accepted juror, for cause shown. *Id.*

L.

LIMITATION.

Time is material only when of the essence of the offence charged, and, in general, the commission of the offence need not be proved as of the date alleged; but when a limitation is prescribed for presentation of an indictment, the time alleged must be within the time limited, and not an impossible day, or a day subsequent to the filing of the indictment. *Shoemaker v. State*, 207.

LOCAL-OPTION LAW.

1. Illegal sale of liquors, where the local-option law is in force, is indictable under that law, but not under the general law of the State. *Robertson v. State*, 155.

2. Wherever the local-option law is in force, it operates to repeal all laws in conflict with it. The general law of the State to regulate retailing is not in force in localities where the local-option law is. *Id.*

3. If a county adopted, and afterwards rescinded, the local-option law of 1876, there is no legal authority for the punishment of persons who sold liquor in the county while it sustained that law. *Halpin v. State*, 212.

M.

MALICE.

MURDER.

1. Though the Penal Code gives no definition of "malice aforethought," it has an established legal signification which is more comprehensive than malevolence, enmity, or revenge, and includes all states of mind in which a homicide is committed without legal justification, extenuation, or excuse. *Tooney v. State*, 163.

2. An actual and deliberate intention unlawfully to take the life of another, or to do him some great bodily harm from which death may probably result, constitutes express malice. *Id.*

3. Implied malice is not a fact, but an inference deduced from particular facts and circumstances, judicially ascertained. *Id.*

4. Though the Code declares all murder by poison to be murder of the first degree, this does not dispense with the malice which characterizes all murder. *Id.*

5. Express malice is never to be inferred from the homicidal act alone, or the means used, but must be proved *aliunde*. *Richarte v. State*, 359.

6. Not correct to instruct that "express malice is where one, with a deliberate intent, kills another with an instrument likely to produce death;" but not material error when the conviction was for murder in the second degree. *Summers v. State*, 365.

7. Homicide with a deadly weapon is not on express malice unless done with a cool and sedate mind, and a formed design to kill, or to inflict serious bodily injury likely to result in death, and without lawful authority, justification, mitigation, or excuse. *Id.*

MALICE — Continued.

8. In trials for murder, the legal signification of malice must be given in charge to the jury; and a conviction for the first degree will be set aside unless the charge also gave the distinction between express and implied malice. *Jones v. State*, 897.

9. Express malice exists when, without justification, extenuation, or excuse, the killing is done with a sedate, deliberate mind, and a formed design to kill, or to do some serious bodily harm likely to result in death; which formed design is evidenced by external circumstances discovering that inward intention,—as, lying in wait, antecedent menaces, former grudges, or concerted schemes to do bodily harm. *Cox v. State*, 498.

MALICIOUS MISCHIEF.

1. A dog which has an owner is a “dumb animal” within the protection of articles 2344 and 2345, Paschal’s Digest. What a dog had previously done is no defence for wantonly killing him when not *in flagrante delicto*. *McDaniel v. State*, 475.

2. Nor is it material that defendant killed the animal by direction of his father. That the evidence shows that he was a *minor* only proves that he was under the age of twenty-one, and not that he was below the age of legal accountability. *Id.*

MANDAMUS.

As this court has no appellate jurisdiction over a judgment of a County Court rendered on appeal from a fine of less than \$100, imposed by a justice of the peace, it is not clear that it has jurisdiction by *mandamus* to supervise the action of the County Courts in such cases, even when purely ministerial; and if not ministerial, but judicial, such supervisory jurisdiction does not exist. *Wyatt v. Barmore*, 332.

MANSLAUGHTER.

1. Insulting words or conduct to a female relative will not mitigate a homicide from murder to manslaughter, unless the killing was really on that provocation, and ensued immediately thereupon, or at the first opportunity. *Hill v. State*, 2.

2. A conviction for manslaughter will not be reversed because the court below charged on the law of that offence, and the jury, in view of mitigating circumstances, convicted therefor, on evidence which would sustain a conviction for murder. *Powell v. State*, 234.

3. See instructions on the law of manslaughter held correct. *Drake v. State*, 649.

MEDICINE.

ILLEGAL PRACTICE OF MEDICINE.

MEDICAL EXAMINERS.

ILLEGAL PRACTICE OF MEDICINE, 8.

MINUTES OF COURT.

OATH TO JURY.

1. The plea of not guilty, made by or entered for the accused, must

MINUTES OF COURT — Continued.

appear by the minutes, and also that the jury were sworn. *Cannon v. State*, 84.

2. Not error at a subsequent term to cause the minutes to be so amended as to show the offence charged in an indictment presented at a previous term. *Townsend v. State*, 574.

MISDEMEANORS.

CHARGE OF THE COURT, 15, 16.

INFORMATIONS.

1. A conviction for misdemeanor will not be set aside on account of the admission of immaterial evidence, if sustained by proper evidence. *Bigby v. State*, 101.

2. The County Courts have concurrent jurisdiction with justices of the peace over misdemeanors punishable by fine not exceeding \$200. *Woodward v. State*, 295; *Solon v. State*, 801.

8. In misdemeanor trials no charge need be given unless requested; but requested instructions, when given or refused, must be in writing, unless the parties consent that it may be done verbally. Disregard of these rules, if excepted to at the time, is error. *Jordan v. State*, 422; *Trippett v. State*, 595; *Williams v. State*, 615.

MISNOMER.

1. There is no orthographical rule controlling the spelling of proper names. If the true and the imputed names are *idem sonans*, it suffices; and if they have a common derivation, but little particularity is requisite. *Williams v. State*, 226.

2. On the trial of *John Williams*, for theft, the verdict found "the defendant, *John William*," guilty. *Held*, a good verdict. *Id.*

MURDER.

MALICE.

1. If the evidence creates the slightest doubt whether the crime may be graded below murder in the first degree, and yet be a malicious killing, the charge to the jury should submit the doubt to them. *Hill v. State*, 2.

2. Insulting words or conduct to a female relative will not mitigate a homicide from murder to manslaughter, unless the killing was really on that provocation, and took place immediately thereupon, or at the first opportunity. *Id.*

8. Statements in dying declarations must be of such a character as would be competent if elicited from a living witness. They must be statements of facts, not of opinion. "S. R. killed me for nothing" is a statement of a matter of fact. *Roberts v. State*, 141.

4. The substance of the declaration may be proved, if the witness cannot state its precise language. *Id.*

5. Instructions on manslaughter ought not to be given when the proof clearly shows a murder in either degree. *Id.*

6. Though the Penal Code makes all murder by poison murder in the first degree, this does not dispense with the malice characteristic of all murder. A murder committed by means of poison, and with either ex-

MURDER — Continued.

press or implied malice aforethought, is declared by the Code to be murder of the first degree. *Tooney v. State*, 168.

7. See in this case a collocation of the provisions of the Penal Code on offences committed by poison, and their respective bearings on instructions to be given to the jury. *Id.*

8. Indictment for murder by poison did not allege an attempt to rob. *Held*, error to instruct the jury to consider whether such was the intent, and thus submit an issue not presented in the indictment. *Id.*

9. In a trial for murder, the accused proposed to show the *animus* of the prosecuting witness, who was a brother of the deceased, by evidence that, after the homicide, he was informed of defendant's residence in another State, and defendant sent him word he desired to return and stand his trial, but was unable to pay the expense. Also, to show the *animus* by evidence that defendant's place of residence in another State was generally known in the county of the *forum* for several years before he was arrested and brought back by extradition process, which was not sent after him until his main witnesses had died. *Held*, not error to exclude such evidence on the ground of irrelevancy and immateriality. *Carlson v. State*, 194.

10. To warrant a conviction on circumstantial evidence, each fact necessary to the conclusion of guilt must be proved by competent evidence, beyond a reasonable doubt; each must consist with the others and with the main fact; all combined must be of a conclusive nature, and lead to a reasonable and moral certainty that the accused, and no other, committed the offence; and they should be not only consistent with the theory of his guilt, but inconsistent with any other hypothesis. In this conviction, for murder of the second degree, these requisites are not met. *Rodriguez v. State*, 256.

11. See an indictment for murder by poison held sufficient. *Marshall v. State*, 273.

12. If the facts raise a doubt whether the jury may convict of manslaughter only, or find justification, they should be pertinently instructed thereupon, and allowed to pass upon the doubt. *Robles v. State*, 346.

13. Express malice is never to be inferred from the homicidal act, or the weapon used, but must be proved *aliunde*. *Richarte v. State*, 359; *Summers v. State*, 365.

14. Homicide with a deadly weapon is not on express malice unless done with a cool and sedate mind, and a formed design to kill, or to inflict serious bodily injury likely to result in death, and without lawful authority, justification, mitigation, or excuse. *Id.*

15. Neither at common law nor under the Code of this State need the intent necessary to constitute murder be an intent to take the life of the party slain. It may be an intent to do him serious bodily harm. *Id.*

16. When the jury convict of murder, their verdict must state whether of the first or the second degree. *Nettles v. State*, 386.

17. A conviction for murder in the first degree will be reversed if the jury were not instructed on malice, and the distinction between express and implied malice. *Jones v. State*, 397.

MURDER — Continued.

18. If a conviction for the second degree was had on evidence sufficient for one in the first degree, it will not be set aside because the court below unnecessarily instructed the jury on the second degree. *Templeton v. State*, 398.

19. See indictment for murder held sufficient. *Carter v. State*, 458.

20. All murder committed with express malice is murder of the first degree, and all murder not of the first is of the second degree. *Cox v. State*, 498.

21. Express malice exists when the killing is done with a sedate, deliberate mind, and a formed design to kill, or to inflict serious bodily harm likely to result in death; which formed design is evidenced by external circumstances,—as, lying in wait, etc.,—in the absence of justification, extenuation, or excuse. *Id.*

22. Note a state of proof not sufficient to sustain a conviction for murder in the first degree. *Id.*

23. See a correct instruction as to the intent deducible from the means or instrument wherewith the homicide was committed. *Gatlin v. State*, 581.

24. If the indictment charges in a single count that the mortal injuries were inflicted by different means,—as, by shooting, striking, and burning,—the State is not compellable to elect between them; nor between different counts introduced for the purpose of meeting the evidence. *Gonzales v. State*, 584.

25. Note the application of the reasonable doubt in this case. *Id.*

26. See this case for proper instructions to the jury when the defence was insanity. *Webb v. State*, 496.

27. Evidence of the state of mind of the accused, both before and after the homicide, is admissible on the question of insanity; and non-professional testimony is competent. If insanity existed at a particular period, its continuance is presumed until disproved, unless it was of a casual character. *Id.*

28. On this question the number of witnesses may be of consequence in the minds of the jury, and the ordinary rule as to cumulative evidence does not obtain. *Id.*

29. Evidence of a difficulty between the parties several hours before the killing cannot, of itself, constitute justification. *Peck v. State*, 611.

30. Previous threats may be proved, but cannot justify, unless the deceased, when killed, manifested a purpose to execute them. *Id.*

31. A life-term in the penitentiary does not transcend the legal punishment for murder in the second degree. *Drake v. State*, 649.

32. Not error, in a trial for murder, to exclude evidence offered by the defence to prove that the deceased made threats against the brother of the accused. *Id.*

N.**NEW TRIAL.**

1. New trials are not grantable to enable the accused to impeach a State's witness. This is now fully settled. *Watson v. State*, 11; *Tooney v. State*, 168.

NEW TRIAL — Continued.

2. Newly discovered evidence, which diligence could have obtained at the trial, is insufficient. And an application for new trial on this ground must disclose the source of information, as well as the evidence. *Id.*

8. In a trial for illegally practising medicine, it was error to overrule an application for a new trial based on the exclusion of evidence offered by the accused to prove that he came within the *provisos* of the act of 1876, "to regulate the practice of medicine." *Smith v. State*, 818.

4. Improper to consider and overrule a defendant's motion for new trial in his absence; but such action may be set aside, and, when he is present, the motion be again decided. *Garcia v. State*, 337.

5. Newly discovered evidence, as cause for a new trial, is subject to the same rules in criminal as in civil cases. Not good cause if diligence would have discovered it before the trial; nor if merely cumulative, or not likely to change the result. *Shultz v. State*, 890.

6. The application must clearly show that the evidence has been discovered since the trial, and that diligence could not have ascertained it before the trial; that it is material; that the witness will testify to it; that its purpose is not to prove a new defence or impeach a former witness; that it is not merely cumulative; and that injustice has been done the accused. Stringent rules and the strictest scrutiny are necessary in regard to applications of this character. *Templeton v. State*, 898.

7. New trial was asked on affidavits of two persons, setting forth that one of the jurors was incapacitated by imperfect hearing and by deficient knowledge of the English language, and the defendant's affidavit of his ignorance thereof until after the trial. The record showing that the juror was examined touching his qualifications, before he was empanelled, it is *held*, that the new trial was properly refused. *Drake v. State*, 649.

NEWLY DISCOVERED EVIDENCE.**NEW TRIAL.****O.****OATH TO JURY.**

1. Recital that the jury "were duly sworn" imports that the legal oath was properly administered to them. *Stinson v. State*, 81.

2. The record must show that the jury were sworn. *Cannon v. State*, 84.

8. Recital that the jury were "sworn to well and truly try the issue joined between the State and said defendant" imports an unauthorized oath, and vitiates the verdict and conviction. *Collins v. State*, 88.

4. Clerks need not recite the oath administered to the jury; but when they do, the recital must not show that it was an unauthorized oath. Their duty in this respect, though simple, is important. *Id.*

OCCUPATION-TAX.**LOCAL-OPTION LAW.****P.****PERJURY.**

1. Indictments for perjury should charge the facts essential to the offence, to wit: (1) The judicial proceeding or due course of justice

PERJURY — Continued.

wherein the oath was taken; (2) the lawful taking of the oath; (3) the testimony given; (4) its materiality; and (5) its wilful falsehood. *Watson v. State*, 11.

2. It suffices to allege that the accused was duly sworn, without setting out the oath; but if the oath be set out, or the manner of administering it be alleged, the proof must correspond. *Massie v. State*, 81.

8. The materiality of the false testimony to the issue must either be apparent, or be expressly alleged in general terms. Not necessary for the indictment to charge, *in hæc verba*, that the accused "committed perjury." *Id.*

PLEA.

The plea of "not guilty," entered by or for the accused, must be entered on the record of the court below, and the transcript for appeal must so show. *Cannon v. State*, 34; *Bush v. State*, 64.

PLEADING.**CARRYING WEAPONS.****INDICTMENT.****INFORMATIONS.**

1. Necessary that the commission of the offence be alleged at a time anterior to the filing of the indictment or information, but not so remote as to show that the prosecution is barred by limitation. *Collins v. State*, 87; *Brewer v. State*, 248.

2. Generally, it suffices to charge the offence in the language of the statute. But if the statute uses generic terms, it is necessary to allege the species; and if extrinsic evidence be necessary to bring the subject of the indictment within the meaning of the statute, corresponding averments are requisite. *Id.*

3. A mistake in alleging the year, though obviously clerical, may be fatal when not corrected in due course. *Id.*; *Robles v. State*, 346.

4. If there be exceptions in the same clause of an act which creates the offence, their application to the defendant or to the subject-matter should be negatived. But if the exceptions be in a subsequent clause, or be not incorporated into the enacting clause by words of reference, they are matters of defence, and need not be negatived. The *provisos* of "an act to regulate the practice of medicine" are not exceptions, and need not be negatived in an information. *Blasdell v. State*, 268.

5. To the rule that the assaulted party must be named in the indictment, the only exception is when the name is unknown to the grand jurors, and that fact must be averred. A description of her as "the wife of T. B.," without averring her name to be unknown, is cause for general demurrer, or in arrest of judgment. *Ranch v. State*, 363.

POISON.**MALICE.****MURDER, 6, 7, 8.****POLICE POWER.**

The police powers of the Legislature contemplate systematic precautionary legislation for the prevention either of crimes or calamities, and

POLICE POWER — Continued.

extend to the protection of the lives, limbs, health, comfort, and quiet of all persons and of all property within the State. *Logan v. State*, 806.

PRESUMPTION OF INNOCENCE.

1. Error to refuse a proper instruction on the presumption of innocence, when none was given in the general charge. *Coffee v. State*, 545; *McMullen v. State*, 577.

2. The doctrine of reasonable doubt does not supply such an omission. *Id.*

PRINCIPALS, ACCESSARIES, ETC.

All who act together in the commission of the offence are principals, and may be separately tried. *Templeton v. State*, 898.

PRACTICE.

BAIL.

BURDEN OF PROOF.

CHARGE OF THE COURT.

FORMER CONVICTION.

HABEAS CORPUS.

JURORS AND JURY.

MINUTES OF COURT.

MISNOMER.

NEW TRIAL.

PLEA.

PRACTICE IN THE COURT OF APPEALS.

SCIRE FACIAS.

SPECIAL VENIRE.

STATEMENT OF FACTS.

VARIANCE.

WITNESS.

1. In a trial for attempting to induce a witness to testify falsely, it seems that the materiality of the solicited testimony was a question for the jury, under proper instructions from the court. *Watson v. State*, 11.

2. Objection that the affidavit for an information was filed on Sunday should be made in the court below, and comes too late if primarily raised in this court. *Stinson v. State*, 81.

3. The same rules of practice which govern the District Courts of this State apply to the County Courts. *Sweeney v. State*, 41.

4. Objection that the indictment was not duly presented in open court must be taken *in limine*, and comes too late if primarily made by motion in arrest of judgment, or for a new trial. *Jinks v. State*, 68; *Templeton v. State*, 898.

5. The jury are the judges of the facts and of the weight of the evidence, and the exclusive judges thereof, except when it is provided by law that proof of a certain fact is to be taken as conclusive or presumptive proof of another fact, or where the law directs that a certain degree of weight is to be attached to certain evidence. *Jones v. State*, 86.

6. Discrepancy or conflict in testimony is, if possible, to be reconciled

PRACTICE — Continued.

by the jury; and, if not reconcilable, they should accredit that best entitled to belief. *Id.*

7. The best existing evidence should be produced or accounted for. *Barnell v. State*, 118.

8. Leading questions are error only when shown to have prejudiced the accused, and not to have been allowed under the exceptions to the general rule. *Henderson v. State*, 184.

9. The judge's signature sufficiently certifies the charge of the court. *Id.*

10. If a special *venire* and the jury-box have been exhausted without filling the panel, talesmen may be summoned on verbal order of court. *Roberts v. State*, 141.

11. Objection that the accused had not been served with a copy of the indictment or of the special *venire* comes too late after verdict. *Id.*

12. Rulings on the evidence are not revisable, unless saved by bill of exceptions. *Id.*

13. A witness living in the county cannot be attached until he has disobeyed a subpoena. Return of service on a subpoena should show that it was read to the witness, and not merely read in his hearing; and if the subpoena is for several witnesses, the return should distinctly show which were and which were not served. *Tooney v. State*, 163.

14. An appeal may be taken at any time of the term after judgment of conviction. It is taken by giving notice thereof in open court, and having the notice entered of record; and this suspends all further proceedings in the court below until it receives the judgment of this court on the appeal. *Bozier v. State*, 220.

15. If the appeal is taken after sentence, it suspends the sentence; if taken before sentence, it is error to pronounce sentence, in disregard of the defendant's objections. *Id.*

16. The court should pass upon the competency of evidence, and not transfer that duty to the jury. *Fore v. State*, 251.

17. See this case as to the proper questions to a witness for the purpose of impeaching another. *Marshall v. State*, 278.

18. Improper to consider and determine a defendant's motion for new trial in his absence, but such action may be corrected when he is present. *Garcia v. State*, 387.

19. It is the province of the jury to reconcile conflicts of testimony, when possible; and, when not possible, to accredit that best entitled to belief. *Brady v. State*, 348.

20. Defendant may be served with copy of the special *venire* at any time after indictment found; but he cannot be put on trial for a day thereafter, unless he waives the delay. *Robles v. State*, 346.

21. Jurors summoned on a special *venire* cannot be excused by the court in advance of the trial. *Id.*

22. Jurors in a capital case should be called and tested in the order their names appear on the *venire*. *Id.*

23. Objection to evidence without assigning the reason therefor is futile, if the evidence tended to prove any fact in issue. *Summers v. State*, 365.

PRACTICE — Continued.

24. A surgeon or physician may be required to divulge the result of his *post-mortem* examination, but not to make one. *Id.*

25. Objection that a State's witness, on his direct examination, was allowed to withhold certain testimony, is not available to the appellant, inasmuch as he did not require its disclosure when the witness was turned over to him. *Id.*

26. Defendant must be present when the verdict of conviction is read. His counsel need not be. *Id.*

27. Leading questions are allowable to correct a failure of memory. And a witness may state introductory matter necessary to make his testimony intelligible, but must be kept within proper limits in his material statements. *Shultz v. State*, 890.

28. During the retirement of the jury to consider of their verdict, the court may, under the provisions of the Code, proceed with other business, or adjourn from time to time, and nevertheless be deemed open for all purposes connected with the case before the jury, — as, for instance, the return of their verdict during recess. *Templeton v. State*, 898.

29. Note repeated temporary postponements of trial in a felony case, which are held not to vitiate the conviction. *Hampton v. State*, 463.

30. Error if the record shows that the jury were summoned by a sheriff who was not sworn as prescribed by section 12 of the jury-law of 1876. *Hicks v. State*, 488.

31. Not necessary that the accused or his counsel be present at the drawing of a special *venire*. *Pocket v. State*, 552.

32. The court below, at a term subsequent to the finding of an indictment, had its record so amended that the entry of the presentment would show the offence charged. *Held*, correct. *Townsend v. State*, 574.

33. Indictments or informations are amendable in matters of form. *Id.*

34. After indictment found, there is no authority to discharge the accused on *habeas corpus*, without bail. *Parker v. State*, 579.

35. If the indictment charges in a single count that the injuries were inflicted by different means, — as, by shooting, striking, and burning, — the State cannot be forced to elect on which of them it will rely; nor, if several counts be introduced simply to meet the evidence, can the State be required to elect between them. *Gonzales v. State*, 584.

36. Not necessary that the verdict be signed by the foreman of the jury. *Williams v. State*, 615.

37. It is advisable, in applying for a continuance, to make the process for the witness part of the application. *Fields v. State*, 616.

38. Printed forms of indictments may be used. *Winn v. State*, 621.

39. Note this case for the practice in applications for a second writ of *habeas corpus*. *Ex parte Foster*, 625.

40. In the organization of juries in capital cases, section 22 of the jury-law of 1876 does not apply. See this case also on the right of peremptory challenge. *Drake v. State*, 649.

PRACTICE IN COURT OF APPEALS.

MANDAMUS.

STATEMENT OF FACTS.

PRACTICE IN THE COURT OF APPEALS — Continued.**TRANSCRIPT.**

1. Objection that the affidavit for an information was filed on Sunday cannot be primarily raised in this court. *Stinson v. State*, 31.
2. A conviction will be set aside if the transcript fails to show that the jury were sworn, or that a plea of "not guilty" was entered for the accused in the court below. *Cannon v. State*, 34.
3. A motion to dismiss an appeal "because the transcript is not such as is required by law," is too vague and general. *Sweeney v. State*, 41.
4. The ultimate determination of the legality and sufficiency of the evidence to support the conviction devolves upon this court, on appeal. *Jones v. State*, 86; *Barnell v. State*, 118.
5. If the proper evidence suffices to sustain a conviction for misdemeanor, this court will not reverse because immaterial evidence was improperly admitted. *Bigby v. State*, 101.
6. It is the practice of this court to withhold comment on the evidence in *habeas corpus* cases. *Ex parte Moore*, 108.
7. In *habeas corpus* cases, on appeal, much consideration is accorded by this court to the construction placed on conflicting testimony by the court *a quo*. *Id.*
8. In considering the sufficiency of the evidence, this court exercises a legal judgment as to what facts suffice to overcome the presumption of innocence. *Barnell v. State*, 118.
9. The system of assignments is merely conventional, and does not abridge the power of this court to dispose of cases without regard thereto; for instance, by dismissing an appeal on account of escape, though the assignment has not been reached. *Brown v. State*, 126.
10. An appeal cannot be reinstated, after it has been advisedly dismissed on account of the escape of the appellant. *Id.*
11. In an arson case, the statement of facts states only such of the evidence as relates to the ownership of the burned structure, and concludes with an agreement that "the other facts proven were sufficient to sustain the verdict." Only by the motion for a new trial is it questioned that the structure was a house. *Held*, that it is to be presumed that the evidence proved that fact. *Jones v. State*, 130.
12. Rulings on evidence will not be revised unless saved by bill of exceptions. *Roberts v. State*, 141.
13. When the record of a misdemeanor case discloses no charge to the jury, this court presumes that none was given; or else that, with the consent of the parties, a verbal charge was correctly given. *Carr v. State*, 153.
14. In the absence of a statement of facts, this court can only revise the indictment. *Carlson v. State*, 194.
15. Without a bill of exceptions, the refusal of a continuance will not be revised. *Blankenship v. State*, 218.
16. A conviction will not be reversed because the court below charged on a less degree of offence than the evidence sufficed to establish; nor because the jury convicted for such less degree. *Powell v. State*, 234; *Templeton v. State*, 398.

PRACTICE IN THE COURT OF APPEALS—Continued.

17. This court will not revise rulings involving matters of fact which are only affirmed in a motion for new trial or an assignment of errors. The facts should be substantiated by bill of exceptions. *Marshall v. State*, 273; *McDaniel v. State*, 475.

18. This court will not reverse on account of the refusal of a new trial, asked on newly discovered evidence, unless apparent that the court below did not properly exercise its discretion. *Shultz v. State*, 390.

19. Nor on account of a mere conflict of evidence. *Templeton v. State*, 398; *Gamble v. State*, 421; *Johnson v. State*, 423.

20. Appellant's widow suggests his death, and this court, being satisfied of the fact, sustains her motion in abatement of the entire case, though the judgment appealed from was for a pecuniary fine. *March v. State*, 450.

21. In a *habeas corpus* case this court will not, with a view to discharging the applicant, consider evidence of a former acquittal. *Griffin v. State*, 457.

22. Without a duly authenticated statement of facts, this court considers only whether the indictment is good, and such an indictment as will support the charge and the verdict. *Carter v. State*, 458.

23. Error when the record shows that the jury were summoned by a sheriff who was not sworn as prescribed in section 12 of the jury-law of 1876. *Hicks v. State*, 488.

24. Nothing appearing to the contrary, this court presumes that attachments were founded on proper predicates. *Farrar v. State*, 489.

25. Comment on the evidence in *habeas corpus* cases will not be made. *Ex parte McKinney*, 500.

26. Applications for continuance, which were addressed to the discretion of the court below, will not be revised unless abuse of that discretion be apparent. *Zumwalt v. State*, 521.

27. Defendant's appeal from the judgment of conviction was dismissed on account of his escape; and, being subsequently apprehended, he was sentenced in the court below, and now appeals from the sentence. The attorney-general moves to dismiss the appeal. *Held*, that the jurisdiction of this court over the case was ousted by the escape, and the motion to dismiss is sustained. *Brown v. State*, 546.

28. Against purely technical objections this court will, by purely technical reasons, sustain the judgment, when the appellant could have suffered no prejudice. *Pocket v. State*, 552.

29. This court set aside a conviction because the verdict found the defendant "guilty," but subsequently a *certiorari* was awarded and a more perfect record brought up, whereby it was shown that the verdict found him "guilty;" and, no error being found, the judgment is affirmed. *Taylor v. State*, 569.

30. Note this case for the practice of this court on appeals in *habeas corpus* cases, and especially for its exposition and application of the constitutional phrase, "proof is evident." *Ex parte Foster*, 625.

PUNISHMENT.

VERDICT, 4, 10, 14.

R.

REPEAL.

LOCAL-OPTION LAW.

The repeal of a penal law, when the repealing statute substitutes no other penalty, exempts from punishment all violaters of the repealed law, unless it be otherwise provided in the repealing statute. Note the operation of this principle in localities which adopted and afterwards abrogated the local-option law of 1876. *Halpin v. State*, 212.

RETAILING LIQUORS.

LOCAL-OPTION LAW.

1. Indictment was sufficient which charged that the defendant "did then and there pursue the occupation of selling spirituous liquors in quantities less than one quart, without first obtaining a license therefor, and has not since paid the tax on such occupation." *Carr v. State*, 153.

2. The local-option law, wherever it is in force, supersedes the general law controlling retailers, and abrogates the occupation-tax on retailing. *Robertson v. State*, 155.

S.

SCIRE FACIAS.

BAIL-BOND.

1. Sureties pleaded *non est factum*, alleging that the bail-bond, since its execution, had been materially altered by the erasure of the signature of another surety, not made a defendant. *Held*, a good answer to the *scire facias*. *Davis v. State*, 48.

2. That the State has taken the accused from the custody of his sureties, and sent him to the penitentiary on another accusation, is a good defence for his sureties. *Cooper v. State*, 215.

SEAL.

The seal of a transcript must be put over the tie, and not under it, and be impressed on some durable substance. *Sweeney v. State*, 41.

SERVICE.

"Served by reading in hearing of" is not a good return on a subpoena. It should be *read to* the witness. If the subpoena comprises several witnesses, the return should show which were served and which not. *Tooney v. State*, 163.

SHERIFF.

JURORS AND JURY, 7.

SPECIAL VENIRE.

JURORS AND JURY.

1. The jury-law of 1876 prescribes no means of completing the panel after the special *venire* and the jury-box have been exhausted, but does not repeal the previous law on that subject. Talesmen may be summoned for the purpose, under the verbal order of the court. *Roberts v. State*, 141.

SPECIAL VENIRE — Continued.

2. Objection that the accused has not been served with a copy of the special *venire* comes too late after verdict. *Id.*

3. The presence of the accused or his counsel at the drawing of a special *venire* is not necessary. *Pocket v. State*, 552.

4. Not necessary that the box used in drawing a special *venire* be one with a sliding lid, as is required in drawing the regular panel. *Id.*

5. That the names were not drawn by the hand of the clerk, but by the deputy-sheriff, while the clerk recorded them as drawn, is a purely technical objection, and not error, when no possible prejudice to the defendant is perceived. *Id.*

6. Defendant is entitled to a list only of those persons summoned whose names appear on the special *venire*. *Drake v. State*, 649.

7. Section 22 of the jury-law of 1876 is not applicable in the organization of juries in capital cases. *Id.*

STATEMENT OF FACTS.

1. The parties in the first instance must make out the statement of facts. If they disagree, the judge makes it out from their statements and his own knowledge. *Carter v. State*, 458.

2. Without a duly authenticated statement of facts, made out during the term of the court at which the conviction was had, this court only revises the indictment, and considers whether it supports the charge of the court and the verdict. *Id.*

3. Without such a statement, exceptions to the charge of the court relevant to the facts cannot be considered. *Id.*

STATUTES CONSTRUED.

Article 1424, Paschal's Digest, which prohibits the issuance of process on Sundays, except in cases of attachment or sequestration, applies only to civil suits. *Stinson v. State*, 81.

STOCK-LAW.**UNLAWFUL HERDING OF STOCK.****SUBORNATION OF PERJURY.****ATTEMPTING TO INDUCE A WITNESS TO TESTIFY FALSELY.****PERJURY.****SWINDLING.**

1. If the title to a chattel was acquired from the owner by false representations, the offence was swindling, not theft. Otherwise, if only the possession was so acquired. *Pitts v. State*, 122.

2. The purchase of property on the credit of another, effected by false representations of his authorization, comes within the statutory offence of "swindling." *Bozier v. State*, 220.

3. Accused offered to prove that he purchased the articles for the family of the person whose credit was used, and delivered them to the latter's wife; but the proof was disallowed because nothing done subsequent to the offence could be a defence. But *held*, that it was germane to the question of *authority* to make the purchase, and should have been admitted. *Id.*

T.

THEFT.

SWINDLING.

1. Indictment may allege the ownership of the property stolen to be in a party unknown to the grand jurors. *Taylor v. State*, 1.

2. If one person has the general and another a special property in the thing stolen, the ownership may be alleged in either. One who, conformably with the estray laws, holds an estray, has a special property therein. *Jinks v. State*, 68.

3. The facts and circumstances which attended the theft may be proved by the State. *Id.*

4. The thing stolen must be sufficiently described for the purpose of identification. If it be coin, the kind must be alleged, if known to the grand jury; and if not known, that fact should be stated. *Williams v. State*, 116.

5. "Fifty silver half-dollar pieces, of the value of fifty cents each," is not a sufficient description. *Id.*

6. If the owner was induced by false representations to part with the possession of his chattel, but not with his title, the offence is theft. But if he was so induced to part with his title, the offence is swindling. *Pitts v. State*, 122.

7. The State having proved the alleged ownership of the stolen animals, the accused adduced testimony tending to prove that he purchased them from one A., not the owner, and offered an unrecorded bill of sale, entirely in the handwriting of an attesting witness, and not shown to be the act of A. *Held*, properly excluded, on objection by the State. *Shoefercater v. State*, 207.

8. The jury were instructed for acquittal if they found that the accused bought the animals in good faith, with or without a bill of sale; but that, if the sale was not in good faith, but made to cover a fraudulent taking, it was no defence. *Held*, a proper question for the jury, and fairly submitted to them. *Id.*

9. Trying an indictment for theft, which was filed March 6, 1877, the court charged that the offence was not barred by limitation if it was committed within five years preceding March 13, 1877. *Held*, erroneous, because this warranted a conviction if the offence was committed after the filing of the indictment, —i. e., between March 6 and 13, 1877. *Id.*

10. Note a state of proof held sufficient to sustain a conviction for theft of animals, notwithstanding positive testimony that the accused bought them from a stranger. *Blankenship v. State*, 218.

11. The ownership and the possession of the property stolen need not be in the same person; and if one has a general and another a special property in the thing stolen, the ownership may be alleged in either. *Fore v. State*, 251; *Trafton v. State*, 480.

12. In a trial for theft, it was error to admit proof that the accused had been extradited from Mexico on a different accusation. *Id.*

THEFT — Continued.

13. Subsequent payment for stolen property is no defence. *Shultz v. State*, 890.

14. Defendant's explanation of his possession of stolen property, given when he is first found with it, or first knows his right is questioned, is evidence for him; and, if satisfactory, the State must disprove it. But his declarations made prior to any adverse claim, or to any suspicion cast upon his right, are not evidence for him. *Hampton v. State*, 463.

15. Indictment for theft of a minor's property charged that it was taken from the possession of "Mrs. J. H., the natural guardian" of the minor. *Held*, a sufficient allegation of the violated possession. *Trafton v. State*, 480.

16. Payment is not tantamount to a voluntary return of stolen property. *Id.*

17. Circumstantial evidence may suffice to prove the want of the owner's consent. His testimony is not indispensable. *Id.*

18. See conflicting evidence which necessitated, as part of the law applicable to the case, and though not asked, an explicit instruction to the jury of the reasonable doubt in respect to the ownership of the stolen property. *Robinson v. State*, 519.

19. An animal taken from its accustomed range is taken from the possession of its owner. Possession is constituted by the actual control and management of property, whether lawful or not. *Crockett v. State*, 526.

20. If the property belongs to a widow and her children under her control, the ownership may be alleged to be in the widow. *Id.*

21. Defence being that the accused was an employee, and acted under his employer's orders, the jury were correctly instructed to hinge their verdict on the question of guilty knowledge. *Taylor v. State*, 529.

TIME.

CHARGE OF THE COURT, 19.

INFORMATIONS, 8.

LIMITATION.

TITLE OF ACTS.

CONSTITUTIONAL LAW.

TRANSCRIPT.

1. The transcript must show that the plea of "not guilty" was entered by or for the defendant, and that the jury were sworn. *Cannon v. State*, 84.

2. The seal of the transcript must be placed over the tie, — not under it, — and be impressed on some substance capable of retaining it; otherwise, a new transcript will be required of the clerk. *Sweeney v. State*, 41.

8. That the plea of "not guilty" was entered must appear by the transcript, or the conviction will be set aside. *Bush v. State*, 64.

4. Clerical errors in the transcript, though obvious, may necessitate a reversal. *Robles v. State*, 846.

U.

UNLAWFUL HERDING OF STOCK.

In a prosecution for unlawfully herding stock on another's land without his consent, and within one-half mile of his residence, the information should allege the number of hours the herding was continued after notice to leave, inasmuch as the penalty is regulated thereby. *Linney v. State*, 344.

V.

VARIANCE.

CHARGE OF THE COURT, 2.

1. See this case upon a question of variance raised upon the official signature of a judge to his *fiat*. *Watson v. State*, 11.

2. An information and the affidavit therefor must agree as to date of the commission of the offence. A variance between them is fatal. *Collins v. State*, 37; *Williamson v. State*, 435.

3. If material averments in an indictment be alleged with unnecessary particularity, the proof should correspond, or a variance may ensue. *Massie v. State*, 81.

4. An information and its supporting affidavit must not vary in alleging the year in which the offence was committed. *Brewer v. State*, 248.

5. In a trial for theft of a "yearling," the charge of the court designated the animal as "the calf described in the indictment." *Held*, an immaterial discrepancy. *Trafton v. State*, 480.

VENUE.

The record must show that the venue was proved, or the judgment will be set aside. *Farborough v. State*, 125; *Boston v. State*, 383.

VERDICT.

1. A verdict which finds the defendant guilty "as charged in the indictment" sufficiently identifies the offence. *Henderson v. State*, 134.

2. In the trial of a single defendant, the verdict may simply designate him as "the defendant," without stating his name. Otherwise, when several defendants are jointly tried, and the verdict is not the same as to all. *Williams v. State*, 226.

3. On the trial of John *Williams*, the verdict found "the defendant, John *William*," guilty. *Held*, a good verdict. *Id.*

4. A verdict which assesses the punishment at "five years' confinement in the penitentiary" sufficiently denotes the duration and place of punishment. The law supplies the "hard labor." *Id.*

5. Verdicts are to have a reasonable construction and intendment, and are not to be avoided unless from necessity, resulting from doubt of their import, or on account of the immateriality of the issue, or a manifest tendency to work injustice. *Id.*

6. Defendant must be present when the verdict of conviction is read. But his counsel need not be. *Summers v. State*, 365.

VERDICT — Continued.

7. Except in murder cases, a general verdict of guilty, and assessing a penalty appropriate to the offence charged in the indictment, is a good verdict of conviction for that offence, though the indictment includes minor degrees. *Nettles v. State*, 886.

8. In murder cases, if the jury convict of murder, their verdict must, in accordance with the Code, specify whether it be of murder in the first or the second degree. *Id.*

9. Note circumstances under which a verdict was properly received by the judge, without a formal reopening of his court, during recess. *Templeton v. State*, 898.

10. A verdict cannot be held excessive if within the limits prescribed by law. *Johnson v. State*, 428.

11. If the sense is clear, neither bad spelling nor faulty grammar vitiates a verdict; but if the sense be not clear, the verdict cannot be permitted to stand. *Taylor v. State*, 569.

12. A verdict finding the defendant "guilty" is bad, there being no such word. *Id.*

13. Verdict need not be signed by the foreman of the jury. *Williams v. State*, 615.

14. A life-term in the penitentiary does not transcend the legal punishment prescribed for murder in the second degree. *Drake v. State*, 649.

W.**WARRANT.**

ARREST.

FALSE IMPRISONMENT.

WILFUL BURNING.

ARSON.

WITNESS.

1. Non-professional witnesses will be permitted to testify on the question of sanity or insanity of the accused. *McClackey v. State*, 320; *Webb v. State*, 596.

2. A surgeon or physician, though not compensated for a *post-mortem* examination, may be required to disclose its result, but cannot be compelled to make one. *Summers v. State*, 865.

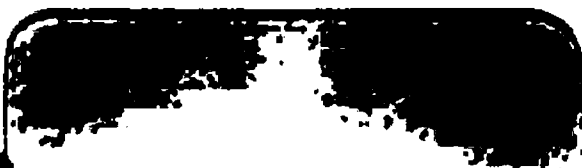
3. Husband and wife are not competent witnesses against each other, unless the offence be one committed by one against the other. *Quære*, if adultery is not such an offence? *Morrill v. State*, 447.

4. The husband of the woman is competent for the State in a prosecution of her paramour for adultery. But it was error to let him testify what his wife's sister told him about the adulterous intercourse. *Id.*

5. A party jointly indicted with the defendant on trial, but the indictment against whom has been dismissed, is a competent witness for both sides. *Id.*

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